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SUPREME COURT, U.S.

No. 81-5169

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ELIGAAH ARDALLE JACOBS,

PETITIONER

VS.

STATE OF FLORIDA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Under Rule 3.191.(d)(2)(iv) of the Florida Rules of Criminal Procedure, the courts may exclude "a period of reasonable delay" resulting from an interlocutory appeal from the period of time within which every person charged with a crime must be brought to trial. In this capital case the Supreme Court of Florida construed and applied the Rule without regard to (i) the length of the delay (fifteen months) caused principally by the state's taking of an interlocutory appeal, (ii) the peripheral subject matter of the interlocutory appeal, (iii) the numerous objections of the petitioner to the delay resulting from the interlocutory appeal process, or (iv) the substantial prejudice to the continuously incarcerated petitioner who was on trial for his life. The decision below thus raises the question whether the Supreme Court of Florida by applying its "speedy trial" rule so as to exclude delays caused by the state's interlocutory appeal without regard to any of the four factors of the "balancing test" announced in Barker v. Wingo, 407 U.S. 514 (1972), has denied petitioner his fundamental due process right to a speedy trial guaranteed by the Fourteenth Amendment.

The decision below is in direct conflict with the controlling authority of Barker v. Wingo, supra, as well as every subsequent federal court decision that has considered the question, and petitioner therefore urges per curiam reversal.

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Jacobs v. State, 396 So.2d 1113 (Fla. 1981), is set out in Appendix B, infra. The opinion of the District Court of Appeal of Florida upon the petitioner's motion to suppress, State v. Jacobs, 320 So.2d 45 (Dist. Ct. App. 1975), is set out in Appendix C, infra.

JURISDICTION

The judgment of the Supreme Court of Florida was announced on February 26, 1981 and entered, with rehearing denied, on May 4, 1981. An order extending to August 3, 1981 the time for filing a petition for writ of certiorari was signed by Justice Powell on June 23, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of a right secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the right to a speedy trial imposed on the states by the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following provisions of the Rules of Criminal Procedure of Florida:

> Rule 3.191. Speedy Trial
>
> (a)(1). SPEEDY TRIAL WITHOUT DEMAND. Except as otherwise provided by this Rule, every person charged with a crime by indictment or information shall without demand be brought to trial within 90 days if the crime charged be a misdemeanor, or within 180 days if the crime charged be a felony, capital or non-capital, and if not brought to trial within such time shall upon motion timely filed with the court having jurisdiction and served upon the prosecuting attorney be forever discharged from the crime; provided, the court before granting such motion shall ascertain that such person has been continuously available for trial during such period of time for trial. The time periods established by this section shall commence when such person is taken into custody as a result of the conduct or criminal episode giving rise to the crime charged. A person charged with a crime is entitled to the benefits of this Rule whether or not such person has been held to answer at a preliminary hearing, or whether or not such person has waived hearing, and whether such person is in custody awaiting trial or is at liberty on bail or recognizance. If such person is serving a sentence of imprisonment elsewhere than Florida for conviction of an unrelated crime, the operation of this section shall not be effective until such person is no longer confined. This section shall cease to apply whenever a person files a demand for speedy trial under §(a)(2).
>
> (a)(2). SPEEDY TRIAL UPON DEMAND. Except as otherwise provided, and subject to the limitations imposed under section (c) hereof, every person charged with a crime by indictment or information shall upon demand filed with the court having jurisdiction and upon service of a copy of such demand upon the prosecuting attorney be brought to trial within 60 days, unless the State is granted a continuance because of exceptional circumstances as defined in this Rule, and if not brought to trial within such period of time following such demand shall upon motion timely filed with the court and served on the prosecuting attorney be forever discharged from the crime; provided, the court before granting such motion shall ascertain that such person has been continuously available for trial during said period of time. The time period established by this section shall commence when such demand has been properly filed and served. If such person is serving in Florida or elsewhere a

sentence of imprisonment for an unrelated crime, the operation of this section shall not be effective until such person is no longer imprisoned and becomes available for trial, nor until such person has abandoned or waived further proceedings under §(b)(2) of this Rule if such have been initiated.

(a)(3). COMMENCEMENT OF TRIAL. A person shall be deemed to have been brought to trial if the trial commences within the time herein provided. The trial is deemed to have commenced when the trial jury panel is sworn for voir dire examination, or, upon waiver of a jury trial, when the trial proceedings begin before the judge...

(c) DEMAND FOR SPEEDY TRIAL: ACCUSED IS BOUND. A demand for speedy trial binds the accused and the State. No demand for speedy trial shall be filed or served unless the accused has a bona fide desire to obtain trial sooner than otherwise might be provided. A demand for speedy trial shall be deemed a pleading by the accused that he is available for trial, has diligently investigated his case, and that he is prepared or will be prepared for trial. Such demand may not thereafter be waived or withdrawn by the accused, except on order of the court, with consent of the State or on good cause shown. Good cause for continuances or delay on behalf of the accused shall not thereafter include lack of preparation, failure to obtain evidence or presence of witnesses, failure to have counsel, or other nonreadiness for trial, except as to matters which may arise after the demand for trial is filed and which could not reasonably have been anticipated by the accused or his counsel. A person who has demanded speedy trial, who thereafter is not prepared for trial, is not entitled to continuance or delay except as provided in this Rule.

(d)(1) MOTION FOR DISCHARGE: TRIAL: WHEN TIMELY. A motion for discharge shall be timely if filed and served on or after the expiration of the periods of time for trial provided for herein; however, a motion for discharge filed before expiration of the period of time for trial shall be deemed effective only as of the date of expiration of the period of time for trial.

(d)(2). WHEN TIME MAY BE EXTENDED. The periods of time established by this Rule for trial may at any time be waived or extended by order of the court (i) upon stipulation, signed in proper person or by counsel, by the party against whom the stipulation is sought to be enforced, provided the period of time sought to be extended has not expired at the time of signing, or (ii) on the court's own motion or motion by either party in exceptional circumstances as hereafter defined, or (iii) with good cause shown by the accused upon waiver by him or on his behalf, or (iv) a period of reasonable and necessary delay resulting from proceedings including but not limited to an examination and hearing to determine the mental compe-

tency or physical ability of the defendant to stand trial, for hearings on pre-trial motions, for interlocutory appeals, and for trial or other pending criminal charges against the accused. For the purposes of this Rule, any other delay shall be unexcused.

(d)(3). CONTINUANCES: EFFECT ON MOTION. If trial of the accused does not commence within the periods of time established by this rule, a pending motion for discharge shall be granted by the court unless it is shown that (i) a time extension has been ordered as provided in §(d)(2), or (ii) the failure to hold trial is due to the unexcused actions or unexcused decisions of the accused, or of a co-defendant in the same trial. If a continuance or delay is attributable to the accused and is not excused, the pending motion for discharge shall on motion by the State be voidable by the court in the interests of justice; provided, however, trial shall be scheduled and commence within 90 days...

(e) AVAILABILITY FOR TRIAL. The trial of an accused who is not available shall be held in abeyance while such person is unavailable. A person who has not been continuously available for trial during the term provided for herein is not entitled to be discharged; no presumption of non-availability attaches, but if the State objects to discharge and presents any evidence tending to show non-availability, the accused then must by competent proof establish continuous availability during the term.

If an accused voluntarily removes himself from the jurisdiction of the court or otherwise acts to make himself unavailable for trial, the right to trial within the time herein provided shall on motion by the State be voidable by the court in the interests of justice. Upon such accused becoming available for trial and upon notice thereof by the accused or his counsel to both the court having jurisdiction over the trial and to the office of the prosecutor, or upon being retaken into custody, the time within which trial is to commence shall be as herein provided and begin anew.

(f) EXCEPTIONAL CIRCUMSTANCES. As permitted by this Rule, the court may order an extension of time or continuance where exceptional circumstances are shown to exist; exceptional circumstances shall not include general congestion of the court docket, lack of diligent preparation or failure to obtain available witnesses, or other avoidable or forseeable delays.

Exceptional circumstances are those which as a matter of substantial justice to the accused or the State or both require an order by the court. Such circumstances include (i) unexpected illness or unexpected incapacity or unforseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and

> adequate trial; (ii) a showing by the State that the case is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate investigation or preparation within the periods of time established by this rule; (iii) a showing by the State that specific evidence or testimony is not available despite diligent efforts to secure it, but will become available at a later time; provided, not more than two continuances shall be granted on this ground; (iv) a showing by the accused or the State of necessity for delay grounded on developments which could not have been anticipated and which will materially affect the trial; (v) a showing that a delay is necessary to accommodate a co-defendant, where there is reason not to sever the case in order to proceed promptly with trial of the defendant; (vi) a showing by the state that the accused has caused major delay or disruption of preparation of proceedings, as by preventing the attendance of witnesses or otherwise.
>
> Under the foregoing circumstances the Court may set a new trial date within a reasonable time...

STATEMENT OF THE CASE

Petitioner, a citizen of Florida, was arrested in Florida on November 17, 1974 and was incarcerated continuously from that date to the trial date, February 10, 1976, a total of almost 15 months. (R. Vol. I, p.3; Vol. IV, p. 699). A Grand Jury in Pasco County, Florida, indicted him on December 12, 1974 for two counts of first degree murder. (R. Vol. 1, pp. 1-2). On the date set for the original trial, March 18, 1975, the State sought the first of what was to be a series of five continuances of petitioner's capital trial. (R. Vol. IV, pp. 678-79). Petitioner objected to each and every continuance and on August 5, 1975 filed a motion to discharge the proceedings for failure to provide him with a speedy trial. (R. Vol. V, pp. 884-86). The motion was denied. (R. Vol. V, p. 938).

The State offered as the reason for the initial extension their intent to file an interlocutory appeal from an order suppressing evidence seized at petitioner's arrest. (R. Vol. IV, pp. 678-79). The reasons given for the remaining four continuances also related to the preparation and prosecution of the interlocutory appeal. (R. Vol. V, pp. 765, 768, 794, 888-90). After an unexplained two week delay by the state, the interlocutory appeal

was commenced on April 4, 1975. (R. Vol. V, p. 760-61). It was not until December 5, 1975 that the trial court finally entered an order affirming the petitioner's motion to suppress the evidence. (R. Vol. V, pp. 911-12). A chronology setting out the events of the case is attached to this petition in Appendix A, infra.

Trial commenced February 10, 1976 resulting in the conviction of the petitioner. (R. Vol. V, pp. 931-935). He received a death sentence on each of the two counts. (R. Vol. VI, pp. 944, 947). During the entire delay of fifteen months resulting from the state's resort to the interlocutory appeal process, petitioner, while incarcerated, maintained he was available for trial. (R. Vol. V, pp. 769, 891-892, 917). Petitioner, during his incarceration at the county jail, was so despondent he tried to commit suicide. (App. D, p. 28a). Petitioner appealed his conviction to the Supreme Court of Florida relying in part on his speedy trial claim. (R. Vol. VI, pp. 976-79). The Supreme Court of Florida rejected his claim and denied a motion for a rehearing. (App. B, pp. 5a - 16a).

HOW THE CONSTITUTIONAL QUESTION WAS RAISED AND DECIDED BELOW

This Court, in referring to the controlling principle as to the question of sufficient presentation, has stated:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

Street v. New York, 394 U.S. 576, 584, (1969) quoting New York ex rel. Bryant v. Zimmerman 278 U.S. 63 (1928).

Florida Rule of Criminal Procedure 3.191., supra, embodies and protects the fundamental right of a speedy trial under the Due Process Clause of the Fourteenth Amendment of the United

States Constitution.[1] Petitioner's repeated claim of denial of a speedy trial under the Florida Speedy Trial Rule advanced his fundamental due process right and is reflected by the overall tenor of the record. (R. Vol. V, pp. 884-86, 891-92, 936-37; Vol. VI, p. 978-79; Brief for Appellant at 19, Jacobs v. Smith, 396 So.2d 1113 (Fla. 1981); Reply Brief of Appellant at 9). The Supreme Court of Florida implicitly recognized petitioner's assertion of this fundamental right when, rejecting his claim, the Supreme Court of Florida stated,

> As we stated in State v. Jenkins, 389 So.2d 971, 974 (Fla. 1980), "(I)f the trial court grants an extension for the period of the appeal plus 'a reasonable period after issuance of the appellate mandate' without specifying the number of days, the time period under rule 3.191(a) is not controlling, and only the constitutional test of reasonableness is applied . . ." (App. B, p. 8a).

Relief was denied petitioner without further explanation and without any consideration of the delay caused by the interlocutory appeal, the validity of the asserted need for the appeal, petitioner's objections to the delay, or possible prejudice to petitioner caused by the delay.

REASONS FOR GRANTING THE WRIT

This petition focuses on the single but critical fact that in this capital case involving the constitutional issue of a speedy trial the Supreme Court of Florida failed to consider or apply the balancing test announced in Barker v. Wingo:

> The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed. A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

407 U.S. 514 at 530.

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[1] This court, in Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967), held that the speedy trial guarantee applied to the states through the due process clause of the Fourteenth Amendment.

The omission by the Supreme Court of Florida is unexplicable: the court specifically noted petitioner's claim to a speedy trial, described in detail the delay caused by the state's interlocutory appeal, stated that the delay must be measured against a "constitutional test", and peremptorily dismissed the issue with the true but inconclusive observation that "the mere lapse of time before trial is not the only factor to be considered under such circumstances." (App. B, pp. 7a-9a). Barker v. Wingo, supra, was neither cited nor discussed.

The fact that the delay was caused principally by the State's interlocutory appeal does not excuse or justify the omission. Lower federal courts have uniformly held that the Barker balancing test must be applied in every case of prejudicial delay caused by the state's pursuit of an interlocutory appeal. See, e.g., United States v. Martin, 587 F.2d 31, 33 (9th Cir. 1978); United States v. Herman 576 F.2d 1139, 1144-47 (5th Cir. 1978); United States v. Brown, 520 F.2d 1106, 1110-13 (D.C. Cir. 1975); United States v. Jackson, 508 F.2d 1001, 1003-05 (7th Cir. 1975); United States v. Calloway, 505 F.2d 311, 315-19 (D.C. Cir. 1974); United States v. Perry, 353 F.Supp. 1235, 1237-41 (D. D.C. 1973).

Admittedly Barker v. Wingo requires the application of the balancing test only when the delay is long enough to be "presumptively prejudicial." 407 U.S. 514 at 530. But surely in a state with a one-hundred and eighty (180) day benchmark,[2] a delay of fifteen (15) months is long enough to create the presumption of prejudice.

Indeed a majority of the federal courts consider a delay of more than one year to be prima facie unreasonable. See, e.g. United States v. Netterville, 553 F.2d 903, 913-14 (5th Cir. 1977); United States v. Calloway, 505 F.2d 311, 316 (D.C. Cir. 1974). Delays as short as six months or thereabouts have been

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[2]See Fla. R. Crim. P. 3.191(a), supra.

sufficient to trigger an analysis of the Barker balancing test.[3] See, e.g., United States v. Barney, 550 F.2d 1251, 1252-53 (10th Cir. 1977); United States v. Carpenter, 542 F.2d 1132, 1134 (9th Cir. 1976); United States v. Butler, 462 F.2d 1275, 1277 (1st Cir. 1970).

For the purpose of applying the Barker test, the right to a speedy trial attaches at the time of the arrest. Dillingham v. United States, 423 U.S. 64, 65 (1975). In this case petitioner was arrested on November 14, 1974 and the trial began February 10, 1976 - a delay of four hundred and fifty-two (452) days, almost fifteen months. Under the authorities cited, this trial delay would be considered "presumptively prejudicial", requiring application of the Barker test. The failure of the Supreme Court of Florida to use the Barker analysis must be regarded as a decision of a federal question in a way which directly conflicts with the applicable decision of this Court[4], mandating summary reversal of the decision below.

The threshold requirement of a prejudicial length of delay having been satisfied, the second factor to be considered in the analysis of a speedy trial claim is the reason for the delay, further revealing petitioner's entitlement to relief. A common source of substantial delay in the judicial process is the taking of an interlocutory appeal by the government prior to trial. See, e.g., United States v. Martin, 587 F.2d 31, 33 (9th Cir. 1978); United States v. Herman, 576 F.2d 1139, 1143 (5th Cir. 1978); United States v. Brown, 520 F.2d 1106, 1109 (D.C. Cir. 1975).

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[3]This Court has suggested that length of delay is related to the reason for delay by the nature of the charge saying, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge...." Barker v. Wingo, 407 U.S. 514 at 531. Petitioner in this case was charged with a serious but not a complex crime. Over a short three day trial, only thirteen people testified and seventeen exhibits were examined. (R. Vol. V, pp. 931-35). Considering the brevity of the trial, the delay of fifteen months is suspect.

[4]See Sup. Ct. R. 17.1(c)(1980).

The State of Florida in this action claimed below that the mere taking of an interlocutory appeal, without more, was a valid and sufficient reason to justify the delay. (R. Vol. IV, pp. 678-79; Vol. V, pp. 765, 768, 794, 888-90). Indeed, it appears to claim that a showing of justification is not necessary. However, in determining the legitimacy of governmental delay, this Court has stated that reasons necessitating the delay must be scrutinized and found to be legitimate. Dickey v. Florida, 398 U.S. 30, 52 (1970). The state of Florida has failed to proffer any such reasons for the delay. In this case the interlocutory appeal of the suppression order was peripheral and inconsequential to the conduct of petitioner's trial, and the prosecution's efforts to reverse the order were, moreover, appropriately rejected by the state court. At issue in the appeal was merely the suppression of a pair of black work boots and some ammunition but not the murder weapon itself. (R. Vol V, pp. 744-45). The state argued that the boots were necessary to match a heel print and that the ammunition connected petitioner to the murder weapon. (R. Vol IV, pp. 737-38). This circumstancial evidence, however, would have been merely cumulative of the testimony of witnesses which placed the petitioner at the location of the crime, and connected petitioner with the precise instrument of the crime. (R. Vol IX, pp. 1424-30, 1449-58, 1463-64, 1504-15, 1532-36). The Appellate Court remanded the suppression motion to the trial court for a findings of fact. (Appendix C, p. 18a-23a). On remand, the trial court found that the statements in the search warrant affidavit were sufficiently erroneous as to invalidate the search warrant. (R. Vol. 5, pp. 909-10). There was sufficient evidence to establish that at the time of the arrest, the law enforcement officers knew the supposed murder weapon, a .38 caliber automatic, was no longer in Florida and that the weapon seized, among other things, a .38 caliber charter arms blue steel two inch barrell pistol, was not the murder weapon. (R. Vol. IV, pp. 695-698; R. Vol. V, pp. 911-12).

Finally, the appeal took no less than nine (9) months[5], a factor which, assuming arguendo that the appeal was necessary, establishes that a considerable portion of the delay was avoidable. See United States v. Brown, 520 F.2d 1106, 1108 (D.C. Cir. 1975); United States v. Perry, 353 F.Supp. 1235, 1238 (D. D.C. 1973); cf. United States v. Osuna-Sanchez, 446 F.2d 566, 567 (9th Cir. 1971). Thus, an examination of the reasons for the delay - a process not undertaken by the Supreme Court of Florida - reveals a virtually frivolous appeal conducted over an unconscionably long period of time. Surely these are circumstances which require the exercise of the supervisory powers of this Court.

With regard to the third factor, the Barker Court held that "the defendant's assertion or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right". 407 U.S. 514 at 528. Petitioner in this case asserted his availability for trial throughout the entire fifteen month period of his incarceration. (R. Vol V, pp. 769, 884-86, 891-92, 917, 936-37; Vol VI, pp. 978-79). After objecting to the second, third and fourth continuances, petitioner requested dismissal for failure to provide him with a speedy trial. (R. Vol. V., pp. 884-86; App. E, p. 30a). Petitioner's counsel also objected to the fifth continuance. (R. Vol. V., pp. 891-92). As to petitioner's acquiescence to the original extension, (R. Vol. V, p. 917), this Court stated as a reason for rejecting the "demand rule" that a defendant should not be penalized for tolerating some delay because he finds it reasonable and helpful in preparing his own case. Barker v. Wingo, supra, 407 U.S. 514 at 527. Petitioner's subsequent objections are important because the State was put on

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[5]The State indicated its intent to file an interlocutory appeal at the suppression hearing on March 17, 1981. (R. Vol. IV, pp. 741-742). On December 5, 1975 the trial court in applying the findings of fact affirmed the suppression order. (R. Vol. V, pp. 911-12).

notice that it would be held strictly accountable for the passage of time. See United States v. Carini, 562 F.2d 144, 150 (2d Cir. 1977); cf. United States v. New Buffalo Amusement Corp., 600 F.2d 368, 378 (2d Cir. 1979). In sum, petitioner has continuously asserted his claim to a speedy trial and the third element of the Barker test is fully satisfied.

The final factor enunciated in Barker is prejudice to the petitioner. Petitioner was denied bond at the bond hearing on March 19, 1975. (R. Vol. IV, p. 681). Thus, he was incarcerated for four hundred and fifty-two (452) days, which included nine months during the entire interlocutory appeal process. This Court has held the speedy trial right to be an important safeguard "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." United States v. Ewell, 383 U.S. 116, 120 (1966). In the case below, there can be little doubt that petitioner has been subjected to significant prejudice by virtue of this inexcusably long period of incarceration under the extraordinary stress of a capital prosecution.

This Court has described the serious disadvantages for an accused who cannot obtain his release:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious.

Barker v. Wingo, supra, 407 U.S. 514 at 532.

Petitioner suffered deprivation of his liberty. (R. Vol. IV, p. 681). There is an abundance of evidence from which to conclude that his health deteriorated, and previous marital problems were exacerbated. (App. D, pp. 26a-27a; R. Vol. IX, pp. 1489-90, 1518-19, 1537, 1541-42, 1547). Anxiety and depression unquestionably had a debilitating effect upon him. Indeed,

petitioner tried to commit suicide by slashing his wrists while he was in the county jail. (App. D, p. 28a).

In Smith v. Hooey, 393 U.S. 374, 380 (1969), this Court recognized that a man isolated in prison is powerless to exert his own efforts to mitigate the erosive effects of the passage of time. Where, as in this case, the conviction of the petitioner is dependent upon circumstantial evidence, the impairment of his defense by the delay resulting from the interlocutory appeal is a factor to which this Court must give serious consideration. Not only is it virtually impossible to ascertain precisely the cost of delay in terms of the effect upon the memories of the parties, but as this Court has observed "what has been forgotten can rarely be shown." Barker v. Wingo, 407 U.S. 514, 532 (1972); see also, Dickey v. Florida, 398 U.S. 30, 53 (1970).

Finally, this Court has "expressly rejected the notion that an affirmative demonstration of prejudice was necessary" to establish the petitioner's constitutional right to a speedy trial. Moore v. Arizona, 414 U.S. 25, 26 (1973).

While society has an interest in an effectively administered criminal justice system, "delays in trials are often one of the gravest threats to individual rights." Burger, The State of the Judiciary - 1970, 56 A.B.A.J. 929, 932 (1970). The delay in this case which the state would justify solely on the ground that it chose to prosecute an interlocutory appeal, for whatever reason and for however long, is a dramatic instance of the threat described by Chief Justice Burger. The burden is upon the government to prove that the delay was justified and here that burden has not been carried. See United States v. New Buffalo Amusement Corp., 600 F.2d 368, 377 (2d Cir. 1979); United States v. Perry, 353 F.Supp. 1235, 1238 (D. D.C. 1973). The Supreme Court of Florida's disposition of this case is vulnerable by virtue of its failure to apply the controlling test as set forth in Barker.

The Supreme Court of Florida's analysis of petitioner's claim completely ignored the appropriate federal constitutional standards to be applied. Under the proper standards, petitioner is entitled on the face of the record to the relief requested.

CONCLUSION

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

CHRONOLOGY

APPENDIX A

JACOBS V. STATE
CHRONOLOGY

DATE	EXPLANATION AND SOURCE	
11/17/74	Defendant arrested (Vol I, p.3)	(trial date was originally set for March 18, 1975; trial actually commenced February 10, 1976)
11/18/74	Advisory Hearing (Vol I, 4-5)	
12/12/74	Grand Jury Indictment (Vol I p. 1-2)	
12/30/74	Arraignment (Pasco County Cir. Crim. Ct. minutes) (Vol. I, p. 200)	
2/26/75	Defendant filed motion to suppress evidence (Vol. II, p. 243-44)	
3/17/75	Hearing on motion to suppress (Pasco County Cir. Crim. Ct. minutes) (Vol. IV, p. 677); court orally granted motion (transcript) (Vol. IV, p. 682-743)	
3/18/75	State filed motion for continuance of Speedy Trial Rule (Vol. IV, p. 678-679)	
	Defendant stated at hearing he was ready for trial, but had no objection to appeal if that was the intention of State (transcript) Vol. V, p. 917)	
3/18/75	Court granted extension of time for trial (Vol. IV, p. 680); Order does not specify time period; Transcript indicates no more than 60 days (Vol. V, p. 918)	
3/19/75	Court denied motion for bond (Pasco County Cir. Crim. Ct. minutes) (Vol. IV, p. 681)	
3/25/75	Court entered order granting suppression (Vol. V, pp. 744-45)	
4/4/75	Notice of Interlocutory Appeal (Vol. V, p. 760)	
4/11/75	State filed motion for extension of time (asked for 30 days) (Vol. V, p. 765)	

DATE	EXPLANATION AND SOURCE
4/11/75	Court granted extension of 30 days for filing of brief; 45 days total from Notice of Interlocutory Appeal (April 4) (Vol. V, p. 766)
4/16/75	Stated filed motion for extension (Vol. V, p. 768)
4/16/75	Defendant objected to motion for extension (Pasco County Cir. Crim. Ct. Minutes) (Vol. V, p. 769)
4/16/75	Court ordered extension for 30 days beginning May 16, 1975 (Vol. V, p. 770)
6/6/75	State filed motion to extend trial (reasonable time necessary for ruling on appeal) (Vol. V, p. 794)
6/11/75	Court ordered extension granting a reasonable period after filing of opinion (Vol. V, p. 795)
7/22/75	State secured trial date of August 26, 1975 (Pasco County Cir. Crim. Ct. Minutes) (Vol. V, p. 883)
8/5/75	Defendant filed motion to discharge (transcript) (Vol. V, p. 917); (Vol. V, p. 884-886)
8/19/75	State filed motion for continuance (Vol. V, p. 888-890)
8/20/75	Defendant filed affidavit opposing motion for continuance (Vol. V, p. 891-92)
8/21/75	Court ordered removal of trial date (Vol. V, p. 893)
8/25/75	Trial continued to be reset (Pasco County Cir. Crim. Ct. Minutes) (Vol. V, p. 894)
9/19/75	Opinion of Appellate Ct. on appeal of motion to suppress evidence (reversed and remanded for fact finding) (App. C. pp. 18a-23a)
9/26/75	Defendant filed motion to modify order of 8/20 extension (Vol. V, p. 896)
11/6/75	Mandate of Appellate Ct. on appeal of motion to suppress evidence to the trial court for findings of fact and remand (Vol. V, p. 902-07)

DATE	EXPLANATION AND SOURCE
12/2/75	Findings of fact on remand of motion to suppress (Vol. V, pp. 909-10)
12/5/75	Amended order granting motion to suppress (Vol. V, p. 911-912)
12/15/75	Trial date reset to February 10, 1976 (Pasco County Cir. Crim. Ct. Minutes) (Vol. V, p. 913)
2/10/76	Court denied motion to discharge (Vol. V, p. 938)
2/10/76	Defendant filed Motion to Quash (Vol. V, pp. 936-37)
2/10/76	Court denied motion to Quash (Vol. V, p. 939)
2/10/76 - 2/13/76	(Trial Cir. Crim. Ct. Minutes of trial) (Vol. V, pp 931-935); (transcript of trial) (Vol. VII-X)

APPENDIX B

OPINION OF THE SUPREME COURT OF FLORIDA

APPENDIX B

Elgrah Ardalle JACOBS, Appellant,

v.

STATE of Florida, Appellee.

No. 49345.

Supreme Court of Florida.

Feb. 26, 1981.

Rehearing Denied May 4, 1981.

Defendant was convicted before the Circuit Court, Pasco County, Ray E. Ulmer, Jr., J., of first-degree murder, was sentenced to death, and he appealed. The Supreme Court, Adkins, J., held that: (1) refusal to give instruction that intoxication may negate specific intent required to establish commission of first-degree murder was not error; (2) defendant was not denied a speedy trial; (3) purge of grand juror from voter list prior to indictment did not render the indictment unlawful; (4) it was not constitutionally impermissible to allow one "trigger man" to plead guilty and be sentenced to life imprisonment, while defendant exercised his right to jury trial and ultimately received a death sentence; (5) refusal to allow defendant to inform jury in closing argument of sentences imposed on accomplices was not error; and (6) consideration of the factual situation as constituting four aggravating circumstances instead of three, in trial judge's finding in support of death sentence, was error but was not prejudicial.

Affirmed.

Sundberg, C.J., and England, J., concurred in affirmance of convictions of guilt, but dissented, with reasons, from affirmance of the death sentences.

Lester Bales, Jr., Zephyrhills, for appellant.

Jim Smith, Atty. Gen., and Charles W. Musgrove, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is a direct appeal from judgments adjudging defendant guilty of murder in the first degree and sentences of death, resulting from a two count indictment. Our jurisdiction vests under Article V, section 3(b)(1), Florida Constitution (1972).

On the evening of March 4, 1974, at approximately 11:00 p. m., the appellant (Jacobs) and three companions, his wife, Thomas Collins, and Elisha Chavis, went to Ed's Country Store in Pasco County intending to rob the store. En route the entire group consumed an undetermined amount of intoxicating beverages.

Upon arriving at the store, Jacobs and Chavis went inside while Jacobs' wife went to the restroom. Collins remained outside near the car. While the robbery was in progress, the caretaker of the store, Grant Ison, reached into his pocket and Jacobs shot and killed him for fear that Ison had a gun. Seconds afterward, Chavis shot and killed the sole other occupant of the store, Barry Marsh, when Marsh approached Jacobs with a large knife. Jacobs and Chavis then left the store taking with them an unspecified amount of beer, cigarettes, and money, which was later divided among the group.

Approximately eight months after the robbery, Jacobs' wife went to Massachusetts where she gave a statement to Lieutenant Richard Coughlin of the Massachusetts State Police setting forth the details of the offense. This information was transmitted to the Pasco County Sheriff's Department and resulted in the arrest of Jacobs, Chavis, and Collins. An indictment was returned charging Jacobs with the two murders. Jacobs was tried and convicted of first degree murder on both counts. He was sentenced to death on each count.

On this appeal Jacobs raises five points as error.

First, Jacobs argues that it was reversible error for the trial judge to refuse to instruct the jury that intoxication may negate the specific intent required to establish the commission of the crime. In the usual

case, to be guilty of first degree murder the defendant must not only intend to kill another human being, but in addition the state must prove that the homicide was perpetrated from a premeditated design. In such case intoxication may make the killer incapable of the reflection called for by the requirement of premeditation. But this case is not the usual case of premeditated murder; this case involves application of the felony murder doctrine.

[1, 2] In cases of felony murder the mental element of the offense is that which is required for the felony; premeditation is supplied by the felony. *Adams v. State*, 341 So.2d 765 (Fla.1976). Thus a defendant charged with first degree felony murder on account of a killing during the commission of a robbery may defend himself on the ground that he was too intoxicated to entertain the intent to rob.

[3] Jury instructions regarding intoxication, however, need not be given in every case in which evidence has been adduced at trial that the defendant consumed alcoholic beverages prior to the commission of the offense. *Shaw v. State*, 228 So.2d 619 (Fla. 2d DCA 1969). There was evidence that Jacobs had used intoxicating beverages, but there was no evidence that Jacobs was intoxicated. There is no evidence as to the amount of alcohol consumed during the several hours Jacobs drove around prior to the robbery.

[4] In this case the record reveals that the trial judge did not commit reversible error in denying the requested jury instructions. The accomplices' testimony shows that the robbery was carried out from a preconceived plan and, until the shooting erupted, it was successful. Also, the evidence clearly shows that defendant was capable of reflection at the time of the homicides and premeditation was thus proved. This being so, the felony murder evidence was merely cumulative to show premeditation.

Jacobs' second point on appeal is that the 180-day speedy trial rule was violated. Jacobs was taken into custody on November

17, 1974. On February 26, 1975, he filed a motion to suppress certain evidence, which was granted on March 17, 1975. On March 18, 1975, the state sought, and the trial court granted, a continuance to take an interlocutory appeal of the suppression order. Fla.R.Crim.P. 3.191. Successive motions for extensions of time were granted to the state by the trial judge, including a June 11, 1975, extension for a reasonable period of time after the appellate court filed its opinion in the interlocutory appeal. The mandate of the appellate court (reversing and remanding the trial court's order granting the motion to suppress) was received by the trial court on November 6, 1975. Jacobs was brought to trial on February 10, 1976.

Jacobs argues that the trial court's initial extension of time was for 60 days and that, because the subsequent extensions were outside the trial court's jurisdiction during the appeal, the speedy trial rule was violated.

[5] Jacobs is in error. A review of the record reveals that the initial extension of time was not limited to a time certain. The extension was for a reasonable time in which the state could expeditiously pursue the interlocutory appeal. The additional extensions of time were effective because only the trial court, not the appellate court, may grant an extension of the speedy trial time period while an interlocutory appeal is pending. *State v. Barnett*, 366 So.2d 411 (Fla.1978).

[6-8] The June 11, 1975, order of the trial court validly extended the time until a reasonable period after the appellate court filed its opinion. As we stated in *State v. Jenkins*, 389 So.2d 971, 974 (Fla.1980), "[I]f the trial court grants an extension for the period of the appeal plus 'a reasonable period after issuance of the appellate mandate' without specifying the number of days, the time period under rule 3.191(a) is not controlling, and only the constitutional test of reasonableness is applied . . . ." In the absence of these time limitations, the question of whether a trial date affords defendant a speedy trial must be determined in the light

of the circumstances of the particular case as a matter of judicial discretion. The mere lapse of time before trial is not the only factor to be considered under such circumstances. This was the reasoning in *State ex rel. Butler v. Cullen*, 253 So.2d 861 (Fla. 1971), where defendant sought a continuance. This rule is equally applicable when the state seeks a continuance. *See King v. State*, 303 So.2d 389 (Fla. 3d DCA 1974).

[9] Jacobs' third point on appeal is that one of the members of the grand jury which indicted him was not a qualified elector on the date the indictment was returned, and the indictment is therefore unlawful. The appellant made a timely motion to dismiss the indictment, which was denied, thereby preserving this point for appeal.

Section 40.01, Florida Statutes (1973), provides *inter alia* that grand jurors "*shall be taken* from the male and female persons over age of twenty-one years, . . . who are fully qualified electors of the respective counties." (Emphasis supplied). The challenged grand juror, although a qualified elector at the time her name was placed on the jury list, was purged from the voter list prior to Jacobs' indictment. Jacobs argues that the participation of this grand juror voids his indictment, citing the case of *Kitrol v. State*, 9 Fla. 9 (1860), where a grand juror who was determined not to be qualified because over the age of sixty at the time he was summoned for jury duty, rendered the indictment void.

The applicable statute, section 40.01, Florida Statutes (1973), merely requires that the names placed on the jury list "shall be taken" from the voting list. *Johnson v. State*, 296 So.2d 71 (Fla.1974). The statute does not mandate that the grand juror be on the voting list when an indictment is returned. Appellant's third point is therefore without merit. *See also Reed v. State*, 292 So.2d 7 (Fla.1974); *Jones v. State*, 289 So.2d 385 (Fla.1974).

[10] Jacobs' fourth point on appeal is that the imposition of the death penalty in this case would be a denial of equal protection. The Florida statute inflicting capital

punishment has been held constitutional. *Proffitt v. State*, 315 So.2d 461 (Fla.1975), *aff'd*, *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Jacobs says, however, that the death penalty is unconstitutionally imposed when a co-defendant on similar facts is not sentenced to death. He cites *Slater v. State*, 316 So.2d 539 (Fla.1975), where we held that the imposition of the death penalty against a defendant convicted a first degree felony murder was unconstitutionally applied where the defendant had been an accomplice and the "trigger man", who had entered a plea of guilty, was sentenced to life imprisonment.

We are not confronted with the situation in which the "trigger man" was sentenced to life and the accomplice improperly sentenced to death, *Slater v. State*, *supra*, nor are we confronted with the situation where the accomplice is sentenced to life and the "trigger man" properly sentenced to death, *Meeks v. State*, 339 So.2d 186 (Fla.1976). Instead, we are confronted with the situation in which there are two "trigger men", one (Chavis), who pleads guilty to second degree murder and is sentenced to life imprisonment, and another (Jacobs), who is convicted of first degree murder in a jury trial and is sentenced to death.

Essentially, appellant's argument is that in case of felony murder involving two "trigger men" it is constitutionally impermissible to allow one "trigger man" to plead guilty and be sentenced to life imprisonment, and allow the second "trigger man" to exercise his right to a jury trial and take his chances that a conviction and death sentence will result. We do not accept appellant's argument. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859, 889, n. 50 (1976).

In a related point, Jacobs argues that the trial judge committed reversible error in denying the defendant the right to inform the jury of the sentences imposed on Jacobs' accomplices. He cites *Messer v. State*, 330 So.2d 137 (Fla.1976), where we remanded to the trial court for the purpose of conducting another sentencing hearing be-

cause the trial judge had erroneously refused to permit the defendant to inform the jury *at the sentencing phase* of the sentences imposed on the defendant's accomplices and of certain psychiatric testimony concerning the defendant.

[11-13] The case *sub judice* is quite different. Jacobs was precluded from informing the jury of the sentences imposed on his accomplices *at closing argument*; he made no attempt to present this evidence at the sentencing hearing. *Messer* stands for the proposition that evidence of the sentences imposed on the defendant's accomplices should not be withheld from the jury at the sentencing phase. § 912.141, Fla.Stat. (1975). Clearly, the jury should be allowed to weigh all the facts and circumstances surrounding the homicide, so that their advisory verdict will be the result of reasoned judgment rather than an exercise in discretion. *Raulerson v. State*, 358 So.2d 826 (Fla.1978). But this does not mean that evidence which is admissible at the sentencing hearing is also admissible at trial. Nor does this mean that the state or the trial judge must provide the jury with such information if the defendant fails to do so; generally, it is improper for the state to disclose that another defendant has been convicted. *Thomas v. State*, 202 So.2d 883 (Fla. 3d DCA 1967). While it is clear that the legislature in the enactment of section 921.141, Florida Statutes (1975), sought to extend the admissibility of evidence at the sentencing hearing, it did not grant the defendant or the state any greater latitude at the trial phase of the bifurcated proceeding.

As for appellant's final point on appeal, we have reviewed the record and determined that it is without merit.

[14] It is our responsibility to review the judgment and sentence imposed upon defendant in light of other decisions and determine whether the punishment is too great. The following findings in aggravation and mitigation were made by the trial court:

FINDING IN SUPPORT OF DEATH SENTENCE

"On February 13, 1976, a majority of the jury recommended in favor of the death penalty for the Defendant; this Court, after considering the recommendation of the jury, and after weighing the aggravating and mitigating circumstances, as contained in Florida Statute 921.-141, sentenced the Defendant to death on each of the two counts as contained in the indictment filed in the above-styled cause and in so doing found as follows:

1. The Defendant committed or aided in the committing of these acts of murder while engaged in the commission of the crime of robbery upon the victims of the murder. The testimony of the three State witnesses, Paula Jacobs, Thomas Collins, and Jean Gray, indicated that the purpose of the Defendant being at the store was to commit a robbery, and that these murders were committed in furtherance of that motive.

2. This capital felony was committed in part for the purpose of avoiding or preventing the arrest or detection of the Defendant for the perpetration of the robbery. The State witness, Jean Gray, testified that the Defendant had made the statement to her that he never left any witnesses and that those that he did leave never "talked." The evidence further disclosed that the participants in the robbery indicated prior to entering the subject store that the witnesses (i. e. ultimate victims) could not be left alive to identify the Defendant Jacobs or others.

3. These acts of murder were committed by the Defendant for pecuniary gain. The testimony of Paula Jacobs and Thomas Collins shows that from the very outset of the sequence of events which led to the deaths of Grant Ison and Barry Marsh, the Defendant and others were together for the sole purpose of committing a larceny.

4. This capital felony was especially heinous, atrocious, and cruel in that the testimony of Paula Jacobs, during the guilt phase of the trial, revealed that the

Defendant started to her immediately following the shooting that after he shot the man behind the cash register, his victim begged the Defendant not to shoot again. Paula Jacobs further testified that the Defendant told her that he had started shooting and was not going to stop. Further, the testimony of the medical examiner shows that the man whose body was found behind the cash register had not died instantly, but was, in fact, alive for as much as an hour after he had been shot three times. Testimony of the medical examiner further indicated that the second victim had been shot a total of six times.

The only mitigating circumstances which this Court finds to exist is that the Defendant has no significant history of prior criminal activity. This Court feels that there are no other existing mitigating circumstances; and that, additionally, the evidence as presented during the guilt phase of the trial specifically negates all but the aforementioned mitigating circumstances found in Florida Statute 921.141(6).

WHEREFORE, this Court, upon weighing the aforementioned aggravating and mitigating circumstances, does, therefore, accept the advisory opinion rendered in this cause by the jury of twelve persons and hereby finds that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Finding 1 lists the aggravating circumstance of murder while engaged in the crime of robbery while Finding 3 includes the aggravated circumstance of murder for pecuniary gain. These are overlapping and constitute only one aggravating circumstance. *Provence v. State*, 337 So.2d 783 (Fla.1976), was an appeal from a judgment of first degree murder and sentence to death. At the sentencing hearing the jury rendered an advisory verdict recommending life. The trial judge considered as factors in aggravation that there were two armed robbery charges pending against defendant

in another state and that, according to the presentence investigation, defendant was at the time of his arrest engaged in ripping off a heroin addict. We held that the court erred in considering mere arrest and accusation as factors in aggravation. In this opinion we said:

> The judge's order does not specifically enumerate which aggravating circumstances under Section 921.141(5), Florida Statutes, induced him to override the jury's recommendation of mercy and to sentence Provence to die. The State argues the existence of two aggravating circumstances that the murder occurred in the commission of the robbery [subsection (d)] and that the crime was committed for pecuniary gain [subsection (f)]. While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the *same aspect* of the defendant's crime. *Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged.* Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, *State v. Dixon*, 283 So.2d 1, 10 (Fla.1973), we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case. . . .

337 So.2d at 786. (Emphasis supplied).

In the case *sub judice* Finding 1, relating to the robbery, and Finding 3, relating to murder for pecuniary gain, constitute but one aggravating circumstance. In *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), we said:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.

Statutes, Section 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.

[15] It is necessary that the trial judge exercise a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances. The trial judge reasoned that a murder committed for pecuniary gain during the course of a robbery coupled with the heinous manner in which death was inflicted, as well as the circumstance that death was inflicted for the purpose of avoiding detection, required the imposition of a death sentence. The fact that these factual situations were considered as four aggravating circumstances instead of three does not indicate that the technical error committed by the judge in any way affected his reasoned judgment.

The case *sub judice* involves the listing of one aggravating circumstance in such a manner that the factual situation became two aggravating circumstances. *Elledge v. State*, 346 So.2d 998 (Fla.1977), involved an entirely different situation. Defendant Elledge was convicted and sentenced to death for the murder of Strack. The homicide occurred on a Saturday afternoon. On Sunday afternoon defendant Elledge murdered Gaffney. On Monday morning defendant murdered Nelson. The court held that admission of evidence of the Gaffney murder at the sentence hearing was improper because there had been no conviction of the defendant for this homicide. Evidence of the Nelson murder was appropriate because defendant had been convicted of this homicide. This Court reasoned that consideration of the Gaffney homicide could have influenced the judge in his reasoned judgment and therefore, defendant should be granted a new sentencing trial. In the case *sub judice* the trial court's reasoned judgment in imposing the death sentence could not have been influenced by an inappropriate factual situation. *Elledge, supra*, is not controlling.

We have carefully reviewed the record in this case and it is our opinion that the aggravating and mitigating circumstances are such that the infliction of capital punishment is warranted.

Finding no error, it is our opinion that the judgments and sentences should be and they are hereby affirmed.

It is so ordered.

BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

SUNDBERG, C. J., and ENGLAND, J., concur in affirmance of the convictions of guilt, but dissent from affirmance of the death sentences. Because of violation of the principles announced in *Provence v. State*, 337 So.2d 783 (Fla.1976) and *Elledge v. State*, 346 So.2d 998 (Fla.1977), they would remand to the trial judge for resentencing.

APPENDIX C

OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA

APPENDIX C

STATE of Florida, Appellant,

v.

Elijaah Ardalle JACOBS, Appellee.

No. 75-503.

District Court of Appeal of Florida, Second District.

Sept. 19, 1975.

Rehearing Denied Nov. 5, 1975.

At hearing on defendant's motion to suppress evidence, the Circuit Court for Pasco County, Robert L. Williams, J., ruled that affidavit for search warrant was insufficient on its face to establish probable cause, and State brought interlocutory appeal. The District Court of Appeal, Scheb, J., held that affidavit for search warrant detailed sufficient underlying facts and circumstances on which to base belief that probable cause existed, and was sufficient on its face, and that at evidentiary hearing held to determine truthfulness of affidavit for search warrant, it was incumbent on trial judge to determine whether affiant made any material misstatements in warrant affidavit.

Reversed and remanded.

Robert L. Shevin, Atty. Gen., Tallahassee, and Davis G. Anderson, Jr., Asst. Atty. Gen., Tampa, for appellant.

Lester Bales, Jr., Zephyrhills, for appellee.

SCHEB, Judge.

The trial court held that an affidavit was insufficient on its face to establish probable cause for issuance of a warrant for search of a dwelling. The state appeals. We reverse and remand.

Deputy Sheriff Everett Keister executed an affidavit on November 18, 1974, in application for a warrant to search a mobile home in Polk County occupied as a private dwelling. A search warrant was issued by a magistrate commanding search of the dwelling therein described. After a hearing on the appellee/defendant's motion to suppress, the trial court ruled Deputy Keister's affidavit was insufficient on its face to establish probable cause. The court suppressed the items seized as a result of the execution of the warrant, including a pair of black work boots and 37 rounds of .380 caliber ammunition not described in the warrant.

[1] The only question now before us is whether Deputy Keister's affidavit [1] was

1. The material part of the affidavit, insofar as relates to the issue of probable cause, states as follows:

> On the night of March 5, 1974 at approximately 5:00 P.M. three white males and one white female, later identified as Ardelle Elijah Jacobs, Thomas Collins and Elijah Chavis and Pauline Jacobs, wife of Elijah Jacobs. The four people were seen in a late model Chrysler cream colored

sufficient on its face to allege probable cause. The affidavit alleges a confession of one Pauline Jacobs to a Lt. Coughlin on November 17, 1974. She stated she accompanied appellee/defendant and two other males at a robbery/murder in Pasco County on March 5, 1974, and that firearms used in that crime were, on November 16, 1974, in the dwelling sought to be searched. This admission, being against penal interest, provides its own indicia of reliability. *United States v. Harris*, 1971, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723. Also, Pauline Jacobs allegedly stated she was present when the appellee/defendant committed the breaking and entering which Deputy Keister was investigating where firearms had been stolen from Sumner's Services in Polk County on October 24,

station wagon parked on a dirt road behind Chancey's Country Store, Hiway 39 on the Hillsborough Pasco County Line. Shortly thereafter three white males entered Chancey's Country Store and robbed one of the two white males at gun point taking from him several hundred dollars and then the three white males or one or two of the three, shot and killed both of the two white males who were in the store and filling station and then left the scene.

Subsequently, to-wit, on or about November 17, 1974, the said Pauline Jacobs confessed to Detective Lieutenant Richard Coughlin of the Massachusetts State Police in Bourne, Massachusetts, that it was she and the said Ardelle Elijah Jacobs, Thomas Collins and Elijah Chavis who had gone in the said cream colored late model Chrysler station wagon to the said Chancey's Country Store and Filling Station and that it was her three male companions aforesaid who robbed and murdered the two white males aforesaid. She further stated to the said Detective Lieutenant Richard Coughlin that she had been in the above-described house trailer or mobile home on Saturday, November 16, 1974 and at that time there was contained in said mobile home or house trailer the firearms which had been used by her male companions in the robbery and murder aforesaid and that when she left said premises said firearms were still there.

Between 5:00 P.M. on October 24, 1974 and 7:00 A.M. on October 24, 1974 the place of business known as Sumner's Service and Motor Parts in the settlement of Willow Oak near Mulberry, Florida was broken in-

1974. Finally, affiant stated he talked with one Thomas Collins, an alleged co-felon in the crime for which appellee/defendant is being prosecuted. Collins, who allegedly admitted his presence at the scene of the Pasco County crime to another police officer, stated to affiant that he had recently been in the dwelling sought to be searched and that it did, indeed, contain 10 or 12 firearms.

[2, 3] The affidavit here details sufficient underlying facts and circumstances on which to base a belief that probable cause exists and is sufficient on its face. Affidavits for search warrants are normally drafted by nonlawyers under the press of criminal investigation and are tested and interpreted by courts in a common

to and the firearms thereinabove described as taken therefrom were taken therefrom. Subsequently, to-wit on or about November 17, 1974 the said Pauline Jacobs stated to the said Detective Lieutenant Richard Coughlin that between 5:00 P.M. on October 24, 1974 and 7:00 A.M. on October 25, 1974 she was in company with the said Ardelle Elijah Jacobs, Thomas Collins and Elijah Chavis, who did break and enter said Sumner's Service and Motor Parts as aforesaid and take therefrom firearms and money.

On the evening of November 17, 1974 Affiant arrested the said Thomas Collins and the said Elijah Chavis and incarcerated them in the Polk County Jail at Bartow, Florida and during the conversation between Affiant and the said Collins, the said Collins told Affiant that he had recently been in said house trailer or mobile home aforesaid belonging to the said Jacobs and had there seen some 10 or 12 firearms in said house trailer or mobile home.

On November 18, 1974, Affiant talked over the telephone to Deputy Sheriff Lt. Vogt of the Pasco County, Florida Sheriff's Office who informed Affiant that he had the said Collins in custody (Collins, Chavis and Jacobs having previously been turned over to the Pasco County Sheriff's Office by Affiant) and that the said Collins had informed him that said Lt. Vogt that he, the said Collins, had been present with the said Jacobs and the said Chavis at the armed robbery and double murder aforesaid, but the said Collins denied taking part in said crimes.

sense and realistic fashion. Therefore, technical requirements of elaborate specificity have no proper place in this area. *United States v. Ventresca*, 1965, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684.

[4] Generally, the sufficiency of a search warrant is determined solely with reference to the warrant and supporting affidavit. *State v. Oldack*, Fla.App. 2d 1973, 283 So.2d 73; *State v. Knapp*, Fla. App. 2d 1974, 294 So.2d 338. But even though sufficient on its face, the court, subsequent to issuance of a search warrant, may make a determination of the truthfulness of the factual statements contained in the warrant affidavit. In cases where the affiant subsequently contradicts material averments made to secure the warrant, or where otherwise such averments are proved erroneous, the warrant may be found to be invalid. *State v. Knapp*, *supra*; *United States v. Jones*, 5th Cir. 1973, 475 F.2d 723; *McConnell v. State*, 1972, 48 Ala.App. 523, 266 So.2d 328.

[5] Here the trial judge apparently concluded it was necessary to go behind the statements in the warrant affidavit. Pursuant to RCrP 3.190(h) an evidentiary hearing was held with testimony taken of Deputy Keister as well as of Detective Henry Rogers and Lt. E. H. Vogt, both of the Pasco County Sheriff's Department. But no findings or conclusions were made by the court on basis of the evidence presented. The court merely concluded the affidavit was insufficient to establish probable cause. However, where, as here, there had been an attack on the truth of the affidavit, it became incumbent on the trial judge to determine whether the affiant made any material misstatements in the warrant affidavit.

On remand, the trial judge should make findings: (a) as to whether any statements in the warrant affidavit were suc-

cessfully contradicted or proven erroneous, and (b) as to the effect of seizure of the items not specified in the warrant; and enter judgment accordingly.

Accordingly, this cause is reversed and remanded for proceedings consistent with this opinion.

GRIMES, Acting C. J., and SCHWARTZ, ALAN R., Associate Judge, concur.

APPENDIX D

EXCERPTS FROM THE MEDICAL RECORDS OF ELIGAAH ARDALLE JACOBS

APPENDIX D

SHANDS TEACHING HOSPITAL AND CLINICS • UNIVERSITY OF FLORIDA • GAINESVILLE

area code 904 [illegible]
zip 32610

August 7, 1975

P. O. Box J 345

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Judge Robert L. Williams
Pasco County Circuit Court
Sixth Judicial Circuit
Pasco County Court House
Dade City, Florida

Re: Eligaah Jacobs
Hospital No. 27-75-73

Dear Judge Williams:

Enclosed is a copy of the complete medical record of the above captioned patient persuent to the instructions of State Attorney Phill Van Allen.

Sincerely,

Carol Bessent

(Miss) Carol Bessent, A.R.T.
Medical Record Librarian
Medical Record Department

Enclosure

19-1030-1

U.S. EMPLOYMENT OPPORTUNITY-AFFIRMATIVE ACTION EMPLOYER

August 6, 1975

Re: JACOBS, Elijah
#27-75-73

Admission: 5-26-75
Discharge: 5-29-75

Medical Director
Reception and Medical Center
Lake Butler, Florida

Dear Sir:

Mr. Jacobs is a 36-year-old white male prisoner with a chief complaint of paralysis in both legs for about a month and a half. According to the history it began about 12 years ago when the patient had a lumbar laminectomy following back trauma. He states that his left leg was weak for a year and a half following that. In 1974 he had back trauma and vaguely dates the onset of his present bladder difficulties to that time. He says that only occasionally can he sense when he has to void and when he does it is usually only in a dribbling fashion and in small amounts. There is usually no voiding of large amounts. There is no fecal incontinence. He describes difficulty with sexual function for which he is very vague for about 12 years. He dates worsening of his bladder function to his fall one and a half months ago at which time he also became unable to walk. The patient has a history of a gunshot wound to his abdomen several years ago. He also has a history of attempted suicide.

Our examination revealed an alert, oriented male who appeared to be in no acute distress. Cranial nerves II-XII were unremarkable. Motor examination revealed normal bulk, strength, and tone in the upper extremities. Lower extremities had normal tone, however, they remained flaccid without any evidence of motor function. The patient, however, could squeeze the buttocks together. There is no spasticity, fasciculations, or wasting. Sensation is absent to the hips, however, he feels a pin on his genitalia and anus. If anything, the level would probably be about L1. He had 1+ reflexes in his upper extremities and 0-1 in his lower extremities. He had intact bulbocavernosus, good anal sphincter tone, and he perceived pain in the perineate well. On rectal examination the patient was found to have an equivocal anal wink. The remainder of his examination was noncontributory. Neck was supple, chest was clear.

The patient underwent several studies including lumbosacral films which showed normal sacroiliac joints, normal chest films. The patient had a myelogram with flow through the thoracic and cervical areas. The myelogram was unremarkable. The patient also had a cystometrogram which was within normal limits including feeling of sensation, urge to void, etc. The patient had

an EKG and serum electrophoresis which were normal. Urinalysis was unremarkable. His IgG was 9.7%, normal being 3-11%; serum CSF VDRL was nonreactive. His electrolytes were unremarkable as well as calcium, LDH, SGOT, total proteins, creatinine, BUN, and uric acid. His corrected sdd rate was 35.26 Since the patient had a normal myelogram and a normal cystometrogram, our impression was paraplegia of unknown etiology. Although we suspect that there is a functional etiology for this we cannot be certain that the patient does not have a transverse myelitis from some other reason. Although we requested an ANA I do not see one in the chart, therefore, we would suggest that this be done to make certain that the patient doesn't have a vasculitis.

Thank you for letting us help take care of your patient.

Sincerely yours,

K. M. Heilman, M.D.
Professor
Department of Neurology

And

Todd Hartley, M.D.
Department of Neurology

KMH:jh

5/26/75 Pen Admit Note

36 yo WM prisoner c CC paralysis both legs x 1½ mos. Hx of difficulty begins 12 yrs ago when had lumbar laminectomy following back trauma. States (L) leg weak for 1½ yrs p that. Nov 74 again had back trauma + rather vaguely dates onset present bladder difficulties to that time. He states that he only voids can sense when he has to void, and when he does it is usually in a dribbling fashion c small amts. Usually no precipitant void of med large amts. No fecal incontinence. Describes difficulty c sexual function very vague x12 yrs (sounds like ? libido rather than impotence). Dates worsening of bladder function to his fall 1½ mos ago when he became unable to walk.

PMH essent. neg. GSW to abd several yrs ago
no meds or allergies

Social - 3 witnesses, including his wife, state that he murdered two men. He has already attempted suicide by slashing wrists while in County jail. Was at Raiford awaiting trial.

Exam

MS - alert, oriented, dull

Motor - nl bulk, power, tone UE's. Essent nl tone LE's, c o motor function, although he can squeeze buttocks together somewhat weakly. No spasticity, no fasciculations.

Sensory - absent vib, prop, pin to hips. Feels pin on genitalia + anus, ↓ somewhat on (R) buttock peripherally. Clonus ↑ UE's. A level is rather vaguely obtainable at L_1.

13-0372-0

Best Copy Available

APPENDIX E

AFFIDAVIT OF FORMER COUNSEL

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF PASCO

Before me, the duly authorized undersigned authority, this date personally appeared LESTER BALES, JR., Attorney at Law, 507 Eighth Street, Zephyrhills, Florida 33599, PH. (813) 782-2079, who, after being first duly sworn by me, deposes and says:

I.

That Affiant, an Attorney at Law, licensed to practice in the State of Florida, by Order of the County Court of the Sixth Judicial Circuit in and for Pasco County, Florida, was appointed as Special Public Defender to represent one ELIGAAH ARDALLE JACOBS, who was indicted on two first-degree murder charges by Grand Jury duly convened in Pasco County, Florida.

II.

That said homicides were subsequently heard by the Circuit Court in and for Pasco County, Florida, being No. 74-1408.

III.

That during the course of said proceedings, two Orders were entered by the Circuit Court in and for Pasco County, Florida, pursuant to motions made by the State for extension of the trial date and the Speedy Trial Rule, said orders being entered on April 16, 1975 and June 11, 1975.

IV.

That Affiant, as attorney for said defendent, did oppose both the said motions and, in fact, never did agree to any extension of the Speedy Trial Rule.

Further Affiant saith not.

Lester Bales

LESTER BALES, JR.

Sworn to and subscribed before me this 30th day of July, 1981.

Linda F. Gray

Notary Public

Notary Public, State of Florida

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 81-5169

RECEIVED
SEP 14 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ELIGAAH ARDALLE JACOBS,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL

THE CAPITOL, Suite 1502
Tallahassee, FL 32301
(904) 488-0290

COUNSEL FOR RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ELIGAAH ARDALLE JACOBS,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Respondent accepts those portions of the Petition for Writ of Certiorari setting forth the Citations to the Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved found on pages one through five of the Petition.

Respondent does not accept the Petitioner's Question Presented in that said Question is argumentative and does not objectively present a concise issue to be reviewed.

QUESTION PRESENTED

WHETHER THE TRIAL COURT AND THE FLORIDA SUPREME COURT IN REVIEWING THE DELAY IN BRINGING PETITIONER TO TRIAL OCCASIONED BY THE STATE'S INTERLOCUTORY APPEAL FROM THE GRANTING OF A MOTION TO SUPPRESS EXCEEDED THE TIME PERIOD PERMISSIBLE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.191(d)(2)(iv).

STATEMENT OF THE CASE

Respondent accepts those portions of the Statement of the Case set out by Petitioner in his Petition for Writ of Certiorari which are not argumentative and are germane to the issue to be reviewed. Respondent would invite this Court to review the Statement of the Case as set forth by the Florida Supreme Court in Jacobs v. State, 396 So.2d 1113 (Fla. 1981) which provides:

> Jacobs' second point on appeal is that the 180 day Speedy Trial Rule was violated. Jacobs was taken into custody on November 17, 1974. On February 26, 1975, he filed a Motion to Suppress certain evidence which was granted on March 17, 1975. On March 18, 1975, the State sought, and the trial court granted, a continuance to take an interlocutory appeal of the Suppression Order. Fla.R.Crim.P. 3.191. Successive motions for extensions of time were granted the State by the trial judge including the June 11, 1975, extension for a reasonable period of time after the appellate court filed its opinion in the interlocutory appeal. The mandate of the appellate court (reversing and remanding the trial court's order granting the motion to suppress) was received by the trial court on November 6, 1975. Jacobs was brought to trial on February 10, 1976.
>
> Jacobs argues that the trial court's initial extension of time was for sixty days and that, because the subsequent extension were outside the trial court's jurisdiction during the appeal, the Speedy Trial Rule was violated.

[Id. at 1115-1116]

HOW THE CONSTITUTIONAL QUESTION WAS RAISED AND DECIDED BELOW

The Florida Supreme Court in addressing the sole issue before it, to-wit: whether Florida's Speedy Trial Rule had been violated, held:

> Jacobs is in error. A review of the record reveals that the initial extension of time was not limited to a time certain. The extension was for a reasonable time in which the State could expeditiously pursue the interlocutory appeal. The additional extensions of time were effective because only the trial court, not the appellate court, may grant an extension of speedy trial time, while an interlocutory appeal is pending. State v. Barnett, 366 So.2d 411 (Fla. 1978).
>
> The June 11, 1975 order of the trial court validly extended the time until a reasonable period after the appellate court filed its opinion. As we stated in State v. Jenkins, 389 So.2d 971, 974 (Fla. 1980):
>
> > "If the trial court grants an extension for the period of the appeal plus 'a reasonable period after issuance of the appellate mandate' without specifying the number of days, the time period under Rule 3.191(a) is not controlling, and only the constitutional test of reasonableness is applied . . ."
>
> In the absence of these time limitations, the question of whether a trial date affords defendant a speedy trial must be determined in the light of the circumstances of the particular case as a matter of judicial discretion. The mere lapse of time before trial is not the only fact to be considered under such circumstances. This was the reasoning in State ex rel Butler v. Cullen, 253 So.2d 861 (Fla. 1971), where defendant sought a continuance. This rule is equally applicable when the State seeks a continuance. See King v. State, 303 So.2d 389 (Fla. 3 DCA 1974).

[396 So.2d at 1116]

The issue before the Court as to whether Florida's Supreme Court violated the Florida Speedy Trial Rule in Petitioner's case does not rise to the level entitling Petitioner to relief by this Court. No federal question has been asserted.

Petitioner's contention that he has repeatedly advanced that the denial of a speedy trial violated his fundamental due process rights and is reflected by the overall tenor of the record is incorrect. This issue as to whether Petitioner's constitutional right to a speedy trial has been violated has never been presented to a State appellate court. Therefore, pursuant to Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969), the issue should not be entertained by this Court.

REASONS FOR NOT GRANTING THE WRIT

Petitioner attempts to expand his complaint presented to the Florida trial and appellate court regarding whether his speedy trial has been violated by suggesting that not only did the State of Florida violate his right to speedy trial under Fla.R.Crim.P. 3.191, but also violated constitutional speedy trial in that the delay of approximately fifteen months from the date of his arrest was an unreasonable delay and therefore, requires review by this Court.

The limited issue before the Florida Supreme Court was:

> "Should a judgment of guilty of murder in the first degree on two charges of homicide and two death sentences be allowed to stand where the Court refused to grant defendant's Motion for an Order discharging the defendant when it did affirmatively appear, in violation of the speedy trial rule, that defendant was incarcerated and available for trial for a period of 450 days?"

Attached as Appendix I to Respondent's pleadings are copies of the briefs filed on behalf of Petitioner and the State of Florida in the Florida Supreme Court.

As observed in Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977), the court held:

> Federal courts review by habeas corpus errors of constitutional dimension. In this case, we are asked to examine a Florida procedural rule. Nowhere in the United States Constitution is there found a right to be brought to trial within 180 days. Although there is a right to a "speedy" trial found in the Sixth Amendment, this rights is "a more vague concept than other procedural rights." Barker v. Wingo, 407 U.S. 514, 521, 92 S.Ct. 2182, 2187, 33 L.Ed.2d 101 (1972). In Barker, the Supreme Court identified some of the factors to be considered in determining whether there had been a denial of speedy trial. Length of delay,

> the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant were the guidelines set by the court. Weighing all these factors, this Court is of the opinion that Davis has failed to establish a denial of his constitutional right to a speedy trial. While he may have shown a denial of the Florida guarantee to be tried in 180 days, if he could count on one state court of appeals rather than another, this is merely a violation of a state procedural rule which does not in any way go to the fundamental fairness of the trial. As such, it is not reviewable by the federal courts on a petition for habeas.
>
> [547 F.2d at 264]

Respondent would tender, therefore, that Petitioner has failed to raise a federal question as to whether Florida's Speedy Trial Rule was violated. Indeed, the Florida Supreme Court in reviewing this limited issue, concluded, as noted previously, that Petitioner's claims did not violate the Speedy Trial Rule in Florida.

Petitioner further asserts that he is entitled to relief because his constitutional speedy trial has been violated directing this Court's attention to the fact that the Florida Supreme Court failed to address the criteria set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). A review of Respondent's Appendix I quickly dispels any inquiry regarding why the Florida Supreme Court did not address said issue.

Petitioner has not raised before the trial or appellate courts of Florida, the issue of whether the delay of fifteen months violated his constitutional right to speedy trial. Pursuant to Cardinale v. Louisiana, supra, this Court has held:

> Questions not raised below are those on which the record is very likely to

> be inadequate, since it certainly was not compiled with those questions in mind, and in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of the constitutional challenge, since the statutes may be construed in a way which saves their constitutionality or the issue may be blocked by inadequate state ground. Even though states are not free to avoid constitutional issues on inadequate state grounds, (cite omitted) they should be given the first opportunity to consider them.
>
> In view of the Petitioner's admitted failure to raise the issue he presents here in any way below, the failure of the state court to pass on this issue, the desirability of giving the state the first opportunity to apply its statute on an adequate record and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to Petitioner, the writ it dismissed for want of jurisdiction.

[394 U.S. at 439]

Assuming arguendo that Petitioner did present this issue before the Florida Supreme Court for review, Petitioner is still not entitled to relief. As noted by this Court in Barker v. Wingo, supra:

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: length of delay, the reason for the delay, defendant's assertion of his right, and prejudice to the defendant.
>
> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance . . .

[407 U.S. at 530]

In the instant cause, the delay from the time Petitioner was arrested, November 17, 1974, to the date of his trial, February 10, 1976, approximately fifteen months passed. Petitioner was indicted by the grand jury in Pasco County, Florida, on December 12, 1974, for two counts of murder in the first degree and on February 26, 1975, Petitioner filed a Motion to Suppress certain evidence. Said Motion was heard and granted March 17, 1975. On March 18, 1975, the State sought and the trial court granted a continuance in order that the State might take an interlocutory appeal based on the suppression order. Upon obtaining a reversal by the appellate court, mandate issued and was received by the trial court on November 6, 1975. On February 10, 1976, Petitioner was brought to trial.

A quick calculation of the time involved reveals that with the exception of the eight month delay occasioned by the State's interlocutory appeal from the granting of the Motion to Suppress filed by Petitioner, approximately six months of delay occurred. Certainly, the six month delay herein cannot even begin to compare with the five year delay occurring in Barker v. Wingo, supra. By any stretch of the imagination, one certainly cannot assume that this delay equates to a delay which is "presumptively prejudicial".

As to the other factors involved, this Court teaches in Barker v. Wingo, supra, no further inquiry is necessary. However, for the record, Respondent would submit that the reasons for the delay was because the State was entitled to take an interlocutory appeal regarding the granting by the trial court of Petitioner's Motion to Suppress physical evidence. There is nothing in this record, nor has Petitioner asserted that he in any way attempted to expedite the appeal taken by the State to the District

Court of Appeal in order to offset the delay in time that a normally prosecuted appeal takes. Moreover, while Petitioner asserts that he indeed objected to the continuing delay in the instant cause, his objections were predicated on the violation of the Speedy Trial Rule not the fact that irreparable harm was being done by the continuing delay in Petitioner's trial being held. Further, Petitioner's assertion that prejudice accrued to his cause by said delay is predicated on the fact that a delay occurred rather than any assertion that his witnesses no longer were available, his defense was impaired, or he was severely disadvantaged by the restraint on his liberty. As noted in Barker v. Wingo, supra:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic quality; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accuseds' interest in a speedy trial is specifically affirmed in the Constitution.
>
> [407 U.S. at 533]

In spite of the fact that a five year delay occurred in Barker v. Wingo, supra, this Court held:

> We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted ex parte. Nut barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant

> was denied his constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial. We hold, therefore, that Barker was not deprived of his due process rights to a speedy trial.
>
> [407 U.S. at 536]

Similarly, in the instant cause, Petitioner caused the delay when he filed his Motion to Suppress and said Motion was granted. The State of Florida at that point had a right as provided under Florida's Speedy Trial Rule to appeal via an interlocutory appeal said ruling and bring Petitioner to trial within a reasonable time thereafter. The record reflects that the trial court upon receiving mandate that reversed the order granting the Motion to Suppress brought Petitioner to trial within three months of said mandate. No speedy trial violation occurred sub judice.

CONCLUSION

Based on the authorities and arguments presented, Respondent would respectfully submit that with regard to the application of Florida's Speedy Trial Rule in the instant cause by the Florida Supreme Court, no federal question has been raised. Moreover, whether Petitioner was denied constitutional speedy trial was never raised before the Florida Supreme Court for appellate review, and therefore, pursuant to Cardinale v. Louisiana, supra, this Court should refrain from considering Petitioner's allegation that his contitutional speedy trial was violated. Finally, Petitioner has failed to meet any of the factors set forth in Barker v. Wingo, supra, with regard to whether a violation

of his constitutional speedy trial has occurred. On any and all of the grounds presented, Petitioner is not entitled to this Court's review.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

By: CAROLYN M. SNURKOWSKI
Assistant Attorney General

THE CAPITOL, Suite 1502
Tallahassee, FL 32301
(904) 488-0290

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished GERALD GILLERMAN, Esquire, of Widett, Slater, & Goldman, 60 State Street, Boston, Massachusetts 02109 via United States mail on this 10th day of September, 1981.

CAROLYN M. SNURKOWSKI
Assistant Attorney General

-of counsel-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 81-5169

APPENDIX I

Edwards Mangrove

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIGAAH ARDALLE JACOBS,	:	
Appellant,	:	
-vs-	:	CASE NO. 49,345
STATE OF FLORIDA,	:	
Appellee.	:	

BRIEF OF APPELLANT

RECEIVED
OCT 25 1976
ATTORNEY GENERAL'S OFFICE

10-25-76
Florida Attorney General

LESTER BALES, JR.
Attorney for Appellant
P. O. Box 1445
Zephyrhills, Florida 33599

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the intervening holiday case

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIGAAH ARDALLE JACOBS, :

Appellant, :

-vs- : CASE NO. 49-345

STATE OF FLORIDA, :

Appellee. :

BRIEF OF APPELLANT

All references in this Brief as to parties involved will be as designated in the Lower Court and will be as follows:

The Appellant, ELIGAAH ARDALLE JACOBS, will be referred to as the Defendant, and the STATE OF FLORIDA, Appellee, will be referred to as the State.

The references to the Records filed in this action will be as follows:

Transcript of Record, consisting of ten volumes, prepared by the Clerk of the Circuit Court of Pasco County, Florida, will be referred to as (Vol. _____, page _____).

It is also noted that pursuant to Motion of Defendant, the Clerk was required to provide a supplemental volume to said transcript that included a transcript of testimony taken on March 18, 1975, on a Motion by the State for a continuance. That said Motion was made on the mistaken belief that said testimony was not included in the original transcript. It was later discovered that said testimony was included in said transcript and, therefore, any reference to said testimony

will be by the original transcript commencing in (Vol. V, page 916).

STATEMENT OF THE CASE

That the Defendant was arrested on November 17, 1974, and charged with Murder in the First Degree, and was taken into custody (Vol. I, page 3). The advisory hearing occurred on November 18, 1974. (Vol. I, pages 4-5). That said Defendant at said advisory hearing, was deemed insolvent and LESTER BALES, JR. was appointed attorney to represent said Defendant.

That the Grand Jury in and for Pasco County, Florida, did on December 12, 1974, enter its Indictment for Murder in the First Degree against said Defendant on two charges (Vol. I, pages 1-2). That Defendants, THOMAS WILLIAM COLLINS and ELISHA JORDAN CHAVIS, were also indicted in said Indictment for the same offenses.

Defendant was arraigned on December 30, 1974, at which time a plea of not guilty was entered to both charges (Vol. I, page 200).

That Defendant filed his Motion to Suppress on February 26, 1975, (Vol. II, pages 243-244). That the Court granted Defendant's Motion to Suppress on March 31, 1975, (Vol. V, pages 744-745) resulting in an Interlocutory Appeal by the State, the Notice of Interlocutory Appeal being filed on April 4, 1975, (Vol. V, page 760). STATE v JACOBS, 320 So. 2nd 45, 2nd DCA (1975). That the State filed its Mandate in said Interlocutory Appeal on November 6, 1975, (Vol. V, pages 902-907). That pursuant to said Mandate the Honorable ROBERT L. WILLIAMS, Circuit Judge, filed his Finding of Facts (Vol. V, pages 909-910).

Commencing on February 10, 1976, a Jury Trial was held and on February 13, 1976, the Jury returned a verdict of guilty of Murder in the First Degree as to both offenses (Vol. IX, pages 1696-1697). That the Jury, following hearing on aggravating and mitigating circumstances, entered its recommendation that the Court sentence the Defendant to death on both counts (Vol. IX, pages 1720-1721).

That the Defendant filed his Notice of Appeal on April 9, 1976, Assignment of Errors, Directions to Clerk, Motion for the Court Reporter to transcribe notes, (Vol. VI, pages 976-982). That by Order of this Court entered on April 30, 1976, Defendant was again adjudged insolvent and LESTER BALES, JR. appointed attorney for said Defendant (Vol. VI, page 985).

STATEMENT OF FACTS

The facts in this case being that shortly before 7:00 A.M. on the morning of March 5, 1974, one EDWIN CHAUNCEY, the owner of a store known as Ed's Country Store, located on State Road 39 and County Line Road in Pasco County, Florida, was notified of trouble at the store and that two persons had been shot.

That EDWIN CHAUNCEY went immediately to the store, arriving there on or about 7:00 A.M. on said date, and discovered both victims, GRANT ISON and BARRY MARSH, apparently dead inside the store. EDWIN CHAUNCEY made a brief inventory of merchandise in the store and stated that beer, cigarettes, cash and one watch was missing. It appeared that GRANT ISON was a personal friend of EDWIN CHAUNCEY, acted as sort of a caretaker for said store, slept there all night and was permitted to drink whatever beer he desired while acting as such caretaker. The Pathologist, Dr. Shinner, who testified subsequently, indicated that both victims were probably under the influence of alcohol at the time of death. The witness Chauncey also stated that GRANT ISON had approximately $350.00 to $500.00 in cash on his person the night before, March 4, 1974, which money was missing on the morning of March 5, 1974.

That the Pasco County Sheriff's Department conducted an investigation of the offenses, discovered no weapons, finger prints or other physical evidence connecting either of the Defendants to the alleged offense.

That pursuant to the testimony of THOMAS WILLIAM COLLINS, brother-in-law of Defendant, (Vol. IX, pages 1418-1469) and the testimony of PAULA JEAN JACOBS, wife of Defendant, (Vol. IX, pages 1501-1562), it appears that on the evening of March 4, 1974, the Defendant, THOMAS WILLIAM COLLINS, the wife, PAULA JEAN JACOBS, and the friend of Defendant, ELISHA JORDAN CHAVIS, took a ride through Polk County, Hillsborough County, and arrived in Pasco County, the location of Ed's Country Store, sometime around 11:00 P.M. that evening.

That according to said witnesses, a plan had been agreed upon to rob Ed's Country Store and the vehicle owned and operated by THOMAS WILLIAM COLLINS pulled up to the gas pump and requested gasoline from GRANT ISON, the caretaker of the store. That the witness, PAULA JEAN JACOBS, proceeded to the ladies room where she said she heard a lot of sound like shooting and when she returned to the motor vehicle her husband, Jacobs, was placing some cigarettes in the vehicle and that later ELISHA JORDAN CHAVIS came out of the store. That during all this time THOMAS WILLIAM COLLINS was standing near the vehicle and did not enter the store. Witness PAULA JEAN JACOBS indicated that they immediately left Ed's Country Store and sometime later stopped and divided some money that Defendants Jacobs and Chavis had in their possession, witness Collins cannot recall this occurrence, then they proceeded to Defendant's home in Polk County where a division of beer and cigarettes taken from Ed's Country Store was made and the

parties separated. Witness PAULA JEAN JACOBS indicated that she and Defendant went to see K. W. TUCKER in Bartow, a friend of Defendant's, where Defendant paid Witness Tucker some money and asked him to apparently give some sort of an alibi should anybody inquire if he had seen Defendant that evening. Witness Tucker cannot recall such conversation or the date (Vol. IX, pages 1565-1567). 1567-8 He did remember

It further appears from the testimony of Defendant Collins and witness PAULA JEAN JACOBS, that all Defendants were indulging in intoxicating beverages of various types throughout the evening prior to the arrival at Ed's Country Store.

Between March 5, 1974, and November 18, 1974, Witness PAULA JEAN JACOBS and Defendant resided at their home in Mulberry, Florida, during which time the witness PAULA JEAN JACOBS indicates that she was guarded and continually watched by the Defendant and other persons. However, Witness PAULA JEAN JACOBS stated that she had an automobile for her own use, the Defendant did engage in his employment giving the witness PAULA JEAN JACOBS considerable time to herself. It then appears that the witness PAULA JEAN JACOBS, while Defendant was in the hospital, left Defendant, traveled to Massachusetts where she gave a statement to a Lt. Richard Coughlin of the Massachusetts State Police setting forth the details of the offense, which information was transmitted to the Pasco County Sheriff's Department and resulted in the arrest of the Defendant at the

Lakeland General Hospital on November 17, 1974.

An Indictment was returned and the Defendant subsequently convicted of both offenses as mentioned under the Statement of the Case.

ARGUMENT

QUESTION 1.

SHOULD A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT ADMITTED HEARSAY TESTIMONY ESTABLISHING ONE ELEMENT OF THE CORPUS DELICTI.

The Lower Court answered in the affirmative. This question was raised by Defendant's Assignment of Errors No. 1.

That during the questioning of Lt. Vogt of the Pasco County Sheriff's Department, the State was attempting to establish one element of the Corpus Delicti, namely the criminal agency of the Defendant involved in this matter, which clearly called for hearsay testimony (Vol. IX, pages 1404-1414). That from said portion of Lt. Vogt's testimony, it would appear that Lt. Vogt called a Sgt. Chiles of the Hillsborough County Sheriff's Department (Vol. IX, page 1404) who suggested that said witness call a Sgt. Keister of the Polk County Sheriff's Department (Vol. IX, page 1405) who suggested he call a Lt. Coughlin of the Massachusetts State Police, who in turn related to said witness what another witness, PAULA JEAN JACOBS, had told him involving Defendant in the criminal offense in question. All of these purported hearsay statements testified to by Lt. Vogt were pursuant to telephone conversations.

It also appears from the transcript of the record in this cause, that neither Sgt. Chiles or Sgt. Keister were called as witnesses and were not listed as such, but Lt. Coughlin was listed as a witness and not called, PAULA JEAN JACOBS was

listed as a State Witness and testified.

It is submitted that Florida aligns itself with states which permit evidence of out-of-court identification as not within the exclusion of the rule against hearsay but limits the use of such evidence to corroboration of other evidence of identity. In other words, the action of Lt. Vogt in securing information leading to the arrest of Defendant was based upon telephone conversations with three separate persons who did not appear at the trial and, of course, were not subject to cross examination. In WILLIS v STATE, 217 So. 2nd 106, the Florida Supreme Court confirmed this rule with respect to the evidence of out-of-court identification as announced in WILLIS but emphasized the necessity of the identifying witness being present in Court and subject to cross examination. This did not occur in the instant case, therefore, the testimony should not have been admitted.

The testimony upon which Defendant Jacobs was convicted was based solely on circumstantial evidence and alleged admissions of Defendant and the admission of the aforementioned double hearsay testimony of Lt. Vogt could be nothing more than prejudicial.

QUESTION 2.

SHOULD JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN INSTRUCTION ON INTOXICATION WHEN TESTIMONY CLEARLY INDICATED THE USE OF INTOXICATING BEVERAGES ON THE DATES AND TIME IN QUESTION AND WERE CLEARLY A MATTER TO BE CONSIDERED BY THE JURY.

The Lower Court answered in the affirmative. This question was raised by Defendant's Assignment of Errors No. 4.

At the trial of this cause, during the testimony of Co-Defendant and State Witness, THOMAS WILLIAM COLLINS, there was evidence presented showing use of intoxicating beverages not only on behalf of said witness but also on behalf of Defendant (Vol. IX, pages 1458-1460). Also, during the testimony of State Witness, JEAN FRANCIS GRAY, evidence was produced showing the indulgence of intoxicating beverages by Defendant (Vol. IX, pages 1476-1486-1487-1488-1489-1490-1495).

It is also important to note that during the testimony of State Witness, PAULA JEAN JACOBS, who is also the wife of Defendant and who was granted immunity in exchange for her testimony in this cause, reference is also made to the indulgence of intoxicating beverages by Defendant (Vol. IX, pages 1520-1531-1532-1548-1550).

In addition to the aforementioned State Witness testimony clearly indicating the use of intoxicating beverages, Defendant by his own testimony, admitted the use of such beverages (Vol. X, pages 1580-1581-1583-1584-1594-1600-1601).

At the charge conference (Vol. X, page 1609) a request was made by defense for the inclusion of a general instruction regarding intoxication, which instruction was denied. Again, at the conclusion of final arguments and out of the hearing of the Jury, defense again brought this matter to the attention of the Court to make sure the request and the denial of same in regard to the giving of instruction concerning intoxication was a matter of record (Vol. X, pages 1694-1695).

It must also be noted that during the testimony of State Witness and Pathologist, Dr. John Shinner, testimony was brought to the attention of the Jury, of an expert nature, concerning the effect of use of alcoholic beverages on the human body (Vol. VIII, pages 1316-1320). It is also noted that during testimony of State Witness, EDWIN DONALD CHAUNCEY, reference was made to the use of alcoholic beverages on behalf of the victims (Vol. VIII, page 1225).

Despite the abundant testimony of the use of alcoholic beverages by the Defendant and by State Witnesses, the State did object and the Court, agreeing with the State, did deny the request for a general instruction on intoxication.

It is submitted that in a prosecution for a crime involving a specific intent, and there is evidence of the Defendant's intoxication at the time of the commission of the offense, he is entitled to an instruction of the law applicable to the effect of intoxication on criminal liability BRYAN v STATE, 194 So. 385.

In LAYTHE v STATE, 330 So. 2nd 113, 3rd DCA (1976), there was evidence presented by the defense showing a withdrawal of Defendant's involvement in a crime prior to the death of the victim. During the trial the Trial Judge refused to instruct the Jury concerning the Defendant's theory of withdrawal. The Third District, in reversing the Lower Court, did indicate that Defendant is entitled to have the Jury instructed on the law applicable to his theory of defense if there is any evidence introduced to support the instruction, however disdainfully the Trial Judge may feel about the merits of such defense from a factual standpoint.

It is submitted that there is an abundance of evidence of use of intoxicating beverages presented in this cause, not only by the Defendant himself during his testimony, but by the State Witnesses who were also Co-Defendants. That for these reasons, Defendant was entitled to have the general instruction of intoxication given and the failure of the Trial Court to do so could do no more than prejudice the defense in this case.

QUESTION 3.

SHOULD JUDGMENTS OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE SAID JUDGMENTS WERE BASED UPON A VERDICT THAT IS CONTRARY TO THE LAW AND WEIGHT OF EVIDENCE PRODUCED.

The Lower Court answered in the affirmative. This question was raised by the Defendant's Assignment of Errors No. 6.

The conviction of Defendant in this matter was based solely upon circumstantial evidence, there being no direct evidence presented against the Defendant, plus the alleged admissions of Defendant made while in an apparent intoxicated condition. It is also submitted that there is no direct evidence showing that the Defendant committed either of the offenses alleged, which together with the complete lack of physical evidence in this case renders this case extremely flimsy to substantiate a conviction of Murder in the First Degree.

It is also noted that the State's chief witnesses consisted of a wife, PAULA JEAN JACOBS, who was granted immunity, and his brother-in-law, THOMAS WILLIAM COLLINS, who through plea bargaining was permitted to plead to a Second Degree on each charge and received a five year sentence to run concurrently and with a recommendation that same be served at a State Institution other than Raiford State Prison (Vol. VI, pages 954-955).

It is also noted that Co-Defendant, ELISHA JORDAN CHAVIS

was permitted to plead guilty to Murder in the Second Degree in both offenses and received life sentences in both cases to run consecutively (Vol. VI, pages 957-958).

During the closing arguments of the trial in the aforementioned matter, during summation by defense counsel (Vol. X, page 1662) the following occurred, the excerpt from said closing statement and objections by the State, ruling by the Court being as follows:

> "Now we had four people we could charge for this, now we're going to let the wife off, we let her off, we let the brother-in-law off with a reduced sentence, and apparently let the other man off with a reduced sentence -- (interrupted)
>
> MR. WEBB: Your Honor, I'm going to object to Mr. Bales' comment. That's not in evidence.
>
> THE COURT: Very well, objection sustained.
>
> MR. WEBB: I ask it be stricken and the Jury instructed to disregard it.
>
> THE COURT: It will be stricken and the Jury is instructed to disregard the last statement of counsel."

There is no question in this matter that the verdicts and judgment is clearly not equal justice under the law as in SLATER v STATE, 316 So. 2nd 539 (1975), the Court indicated that Co-Defendants should not be treated differently on the same or similar facts.

As the Court will recall in Slater three persons were involved in a robbery and murder of a motel manager in Orlando, Florida.

One Defendant pleaded Nolo Contendre and was sentenced

to life imprisonment, one Defendant was permitted to plead guilty to robbery, was given five years imprisonment, and the third Defendant, Slater, was found guilty and the Court over-ruling the Jury on an advisory sentence, entered the death sentence against Slater. Also in SLATER the death sentence was reduced to life imprisonment.

Another very important fact in this matter was the objection and ruling by the Court striking the question concerning the involvement of the Co-Defendant Chavis in this matter. It was the opinion of defense counsel that the Jury was entitled to know that Co-Defendant Chavis, through plea bargaining, had been permitted to plead guilty to a lesser offense. In MUSSER v STATE, 320 So. 2nd 137 (1976) it was noted that during the sentencing portion of the trial, the Appellant was not permitted to submit evidence of plea bargaining and the entrance of a reduced sentence against the Co-Defendant. This Court, in again citing SLATER stated that Defendant should not be treated differently upon the same or similar facts and that the Jury should have had the benefits of the consequences suffered by the accomplice at arriving at its recommendation of the sentence to be visited upon the Appellant.

It is, therefore, again respectfully submitted that the verdict and judgment entered in this cause was not equal justice under the law and that the same should not be permitted to stand.

927-928

995-998

QUESTION 4.

SHOULD JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION TO QUASH THE INDICTMENT WHEN IT CLEARLY APPEARED THAT ONE MEMBER OF THE GRAND JURY ISSUING SAID INDICTMENT WAS NOT QUALIFIED AS SUCH GRAND JUROR UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

The lower Court answered in the affirmative. This question was raised by Defendant's Assignment of Errors No. 7.

It affirmatively appeared from the records in this cause that one JIMMIE MARIE BROOKS, also known as JIMMIE MARIE McCALL, was a member of the Grand Jury who issued the Indictment in this cause on December 12, 1974, (Vol. I, pages 1-2).

It is also respectfully submitted that under Section 40.01, Florida Statutes (1973), a Grand Juror, in order to be qualified as such, has to be a qualified elector in their respective county. Under Article VI, Section 2, Florida Constitution, to be a qualified elector, it is required that a person be registered to vote in the county of residence.

Defendant filed his Motion to Quash the Indictment in this matter (Vol. V, pages 936-937) based upon the Affidavit of the Supervisor of Elections which showed that the said JIMMIE MARIE BROOKS was not a qualified elector on December 12, 1974, the date of the issuance of the Indictment in this cause. As stated in KITROL v STATE, 9 Fla. 9 (1860) a Grand Jury must consist of men possessing the qualifications prescribed by Statute and one incompetent Grand Juror will render

an Indictment void.

It is, therefore, respectfully submitted in this matter that pursuant to the records of the Supervisor of Elections of Pasco County, Florida, the aforementioned member of the Grand Jury was not a qualified elector of Pasco County, Florida, and therefore the Indictment issued was void.

QUESTION 5.

SHOULD A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN ORDER DISCHARGING THE DEFENDANT WHEN IT DID AFFIRMATIVELY APPEAR, IN VIOLATION OF SPEEDY TRIAL RULE, THAT DEFENDANT WAS INCARCERATED AND AVAILABLE FOR TRIAL FOR A PERIOD OF 450 DAYS.

The Lower Court answered in the affirmative. This question was raised by Defendant's Assignment of Errors No. 8.

As the record reflects in this cause, Defendant ELIGAAH ARDALLE JACOBS, was taken into custody on November 17, 1974, (Vol. I, page 3), the trial in this cause commencing on February 10, 1976, (Vol. V, page 913), or the number of 450 days between the arrest and trial. That it is also shown by the complete record in this cause that Defendant was continually available for said trial since the November 17, 1974, date.

That the first trial in this matter was scheduled for March 18, 1975.

On February 26, 1975, Defendant Jacobs filed a Motion to Suppress certain evidence (Vol. II, page 243) and that pursuant to a hearing held on March 17, 1975, said Motion to Suppress was granted (Vol. IV, page 677), said Order being the subject matter of an Order entered on March 25, 1975, (Vol. V, page 744). That on the date of the trial March 18, 1975, State filed a Motion for Extension of Time or Continuance of Trial under Speedy Trial Rule, Rule 3.191 (f) F.R.C.P. That at a

hearing held on March 18, 1975, on the State's Motion for a Continuance of the trial date, the State did represent to the Trial Court that it intended to take an Interlocutory Appeal from the Order suppressing evidence, that the State Attorney's Office, through Assistant State Attorney Yon, would personally prosecute the appeal (Vol. V, page 917) and that a maximum of sixty days, or a lesser number of days, would be necessary to complete said Interlocutory Appeal (Vol. V, page 918). That pursuant to said Motion and representation by the State, the Court did enter an Order granting the continuance as requested (Vol. IV, page 680).

That although the State represented to the Court that it would give its immediate attention to the prosecution of the Interlocutory Appeal, the Notice of said Interlocutory Appeal was not filed until April 4, 1975, (Vol. V, page 760), together with the other appeal documents. That immediately after filing the appeal documents, the State filed a Motion for an Extension of Time requesting an additional thirty days for preparation of a Brief, resulting in an Order of Court granting a total of forty-five days from the filing of the Notice of Interlocutory Appeal to the filing of the Brief (Vol. V, page 766).

By Motion filed April 16, 1975, the State again moved for an extension of time for trial in order to prosecute the Interlocutory Appeal (Vol. V, page 768). Defendant Jacobs objected to such continuance (Vol. V, page 769) but that by Court Order (Vol. V, page 770) the period of time during which said

Defendant must be brought to trial was extended for a thirty day period commencing May 16, 1975, meaning that under the Court's Order of April 16, 1975, Defendant had to be brought to trial by June 16, 1975. That by Motion filed June 6, 1975, (Vol. V, page 794) the State again, by the State Attorney's Office, moved for an extension of time for trial resulting in another Order of the Court extending the trial date for a reasonable period after the Second District Court of Appeals filed its Opinion on the State's Interlocutory Appeal (Vol. V, page 795). That although the State Attorney's Office, during the hearing of March 18, 1975, (Vol. V, page 918) had represented it would prosecute the Interlocutory Appeal, it appears that the matter was immediately turned over to the Attorney General's Office, who filed the Brief for the State and represented the State in oral argument before the Second District Court of Appeals.

That by action of the State Attorney's Office in open Court on July 22, 1975, (Vol. V, page 883), the trial in the aforementioned matter was reset for August 26, 1975. That as shown by the Affidavit of the attorney for Defendant Jacobs, immediately upon receiving Notice of Trial, he did contact State Attorney's Office and in a personal conversation with Assistant State Attorney Phillip Van Allen, said defense attorney was advised that a decision had been made to go to trial without the evidence suppressed by this Court's Order at which time attorney for Defendant Jacobs advised said Assistant State

Attorney Van Allen that defense was ready for trial as set forth in Affidavit of defense counsel (Vol. V, page 884).

That Defendant would further show that upon receipt of the Notice of Trial and being advised by the State Attorney's Office that said trial would be held on August 26, 1975, Defendant immediately filed a Motion in the Second District Court of Appeals for dismissal of the State's Interlocutory Appeal on the basis of abandonment. On August 19, 1975, the State, through the State Attorney's Office, filed another Motion for Continuance (Vol. V, page 888), said Motion and supporting Affidavit (Vol. V, page 887), indicating that an error had been made by the State Attorney's Office in securing the trial date of August 26, 1975. That upon hearing on the State's Motion an Order was entered removing said case against Defendant Jacobs from the Trial Docket (Vol. V, page 893), but that said Order did not extend the trial date. That no further Order was entered by the Court extending the trial date in this matter.

There is no question that all of the continuances sought and secured by the State in this case were secured under the exceptional circumstances provision of Rule 3.191 (f) F.R.C.P. (Vol. IV, page 678). It is also well established by Florida Law that in such instances an express order of the court is required in order to toll the Speedy Trial period of 180 days which in the instant case did expire on May 26, 1975, MULLIN v STATE, App. 1974, 307 So. 2nd 829. It is again noted that the special circumstances alleged by the State in its first Motion for Ex-

tension (Vol. IV, page 678) was for the purpose of prosecuting an Interlocutory Appeal and the record clearly indicates there was only one valid continuance and that being for a period of sixty days from March 18, 1975, expiring on May 18, 1975.

As aforementioned, the State filed its Notice of Interlocutory Appeal on April 3, 1975, (Vol. V, page 760) and it would, therefore, appear that the filing of said Notice of Interlocutory Appeal gave the Second District Court of Appeals full jurisdiction of the parties and subject matter of said action, Rule 3.2 (d), Fla. App. Rules. It would also appear that under Rule 6.61, Fla. App. Rules, that before the Record on Appeal was filed in the Second District Court of Appeals, the Lower Court could fix extension of time, etc., which applies to those certain ministerial functions concerning extensions for filing a Clerk's Record, Court Reporter's Record and Briefs of the parties. That under the interpretation of either of said Rules, it would appear that the Lower Court retains no jurisdiction for the entrance of any order extending time for trial subsequent to the March 18, 1975, Order. STATE OF FLORIDA v THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, 187 So. 2nd 890.

In Summary to this point of the argument, it would appear that the State requesting continuance of the trial date based upon the exceptional circumstances of prosecuting an Interlocutory Appeal did not perform pursuant to its representation to the Lower Court in concluding said matter within a sixty day period. In fact it would appear that the State

Attorney's Office immediately turned the matter of appeal over to the Attorney General's Office and subsequently thereto merely participated in procuring the continuances reflected throughout the trial record. In the instant case we would again state that the extension of time could not be interpreted to exceed May 18, 1975. Appellate Courts have placed a very strict interpretation upon this Rule concerning speedy trials, STATE v JONES, 332 So. 2nd 699 (Fla. 1st DCA, 1976), and the Defendant Jacobs who has been incarcerated and available for trial since November 17, 1974, was clearly entitled to a speedy trial no later than May 26, 1975, unless a valid continuance had been awarded under the aforementioned Rule.

Again, in summary, we would state that the facts clearly show that the Defendant was incarcerated and available for trial for a period of 450 days and that the only valid extension of time granted in this matter was a sixty days extension of time entered on March 18, 1975. That further attempts to secure extension of trial date by the State were not effective for that purpose. The State failed to live up to its representations and, therefore, the Defendant should be discharged.

CONCLUSION

It is, therefore, respectfully submitted that this Honorable Court should, upon consideration of this appeal, enter its Order either:

1. Directing the immediate discharge of Defendant for failure of the State to provide a speedy trial, or

2. Enter its Order reversing the judgment and sentence of the Circuit Court of Pasco County, Florida.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIGAAH ARDALLE JACOBS, :

Appellant, :

-vs- : CASE NO. 49,345

STATE OF FLORIDA, :

Appellee. :

CERTIFICATE OF SERVICE

I, LESTER BALES, JR., Attorney for Appellant, do, hereby, certify that a true copy of the Brief of Appellant has been furnished by regular U. S. Mail to the Honorable ROBERT L. SHEVIN, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32304, this 21 day of October, 1976.

Lester Bales, Jr.
Attorney for Appellant
P. O. Box 1445
Zephyrhills, Florida 33599

IN THE SUPREME COURT OF FLORIDA

ELIGAAH ARDALLE JACOBS,	§	
Appellant,	§	
-vs-	§	CASE NO. 49,345
STATE OF FLORIDA,	§	
Appellee.	§	

11-15-76

BRIEF OF APPELLEE

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IN THE SUPREME COURT OF FLORIDA

ELIGAAH ARDALLE JACOBS,	§	
Appellant,	§	
-vs-	§	CASE NO. 49,345
STATE OF FLORIDA,	§	
Appellee.	§	

BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellant was defendant in the Circuit Court in and for Pasco County, Florida. Appellee was the prosecution. The parties will be referred to as they appear before this Court.

"R" will be used to designate the record on appeal herein.

STATEMENT OF THE CASE

Appellee will accept Appellant's statement of the case, but would note that the trial court's findings in support of the death penalties are at (R-969-970).

STATEMENT OF THE FACTS

Appellant's statement of the facts is reasonably accurate, but Appellee would note that:

Appellant's assertion at page 5 that Ison had $350-to-$500 is unsupported. Witness Channey knew he had $170-(R-1217), and thought he had at least $400-(R-1229)

Also on page 5, Appellant says nothing was found at the scene to link any defendant to the offense. This is not supported by the record. However, the record does show that no evidence of that nature was introduced at trial.

Contrary to Appellant's claim on page 6, witness Collins did recall stopping and getting some of the money. (R-1430-1431) Contrary to his claim on pages 7, witness Tucker did recall Appellant's effort to establish an alibi through him. (R-1567-1568)

POINTS INVOLVED

POINT I

SHOULD A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT ADMITTED HEARSAY TESTIMONY ESTABLISHING ONE ELEMENT OF THE CORPUS DELICTI.

POINT II

SHOULD JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN INSTRUCTION ON INTOXICATION WHEN TESTIMONY CLEARLY INDICATED THE USE OF INTOXICATING BEVERAGES ON THE DATES AND TIME IN QUESTION AND WERE CLEARLY A MATTER TO BE CONSIDERED BY THE JURY.

POINT III

SHOULD JUDGMENTS OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE SAID JUDGMENTS WERE BASED UPON A VERDICT THAT IS CONTRARY TO THE LAW AND WEIGHT OF EVIDENCE PRODUCED.

POINT IV

SHOULD JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION TO QUASH THE INDICTMENT WHEN IT CLEARLY APPEARED THAT ONE MEMBER OF THE GRAND JURY ISSUING SAID INDICTMENT WAS NOT QUALIFIED AS SUCH GRAND JUROR UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

POINT V

SHOULD A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN ORDER DISCHARGING THE DEFENDANT WHEN IT DID AFFIRMATIVELY APPEAR, IN VIOLATION OF SPEEDY TRIAL RULE, THAT DEFENDANT WAS INCARCERATED AND AVAILABLE FOR TRIAL FOR A PERIOD OF 450 DAYS.

POINT I

A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES SHOULD BE ALLOWED TO STAND WHERE THE COURT ADMITS EVIDENCE THAT APPELLANT WAS ARRESTED AFTER UNDISCLOSED CONVERSATIONS WITH OTHERS.

A R G U M E N T

Appellant says the Court admitted hearsay to establish his criminal agency, but a careful review of (R-1404-1411), reveals that the witness did not reveal the subtance of any conversation. All he did was to say he had the conversation, then arrested Appellant. That is neither hearsay nor proof of Appellant's criminal agency. As this Court said in Collins v. State, 65 So.2d 61 at 67 (Fla. 1953):

> "* * * An officer may say what he did pursuant to information but he may not relate the information itself for such is hearsay * * *." at 67

POINT II

JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES SHOULD BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN INSTRUCTION ON INTOXICATION WHEN TESTIMONY INDICATED THE USE OF INTOXICATING BEVERAGES ON THE DATES AND TIME IN QUESTION.

A R G U M E N T

Appellant asked for and was refused a general instruction on intoxication. (R-1609, 1694-95) To support his request he cites every mention of drinking in the evidence.

How the evidence that the victims were drinking can require an instruction on the effect of intoxication on Appellant eludes this writer. Nor is the testimony of Jean Gray or most of that of Paula Jacobs pertinent, since they testified as to his condition in May when he bragged of what he did, not his condition in March during the killings. All that remains is Collins' testimony that Appellant was drinking an unspecified quantity of beer, and had passed the liquor bottle in the car (R-1459, 1460), a brief reference by Paula Jacobs that the men were drinking an unspecified amount (R-1531, 1532), and Appellant's testimony that he was at home that night drinking, and could not possibly have left home and committed the murders. (R-1580-1585)

Appellant relies on Bryan v. State, 194 So. 385,

141 Fla. 676 (1940), which holds that it is not error to give such a charge in a proper case, but does not require the charge. The case is illustrative of the type of evidence which will justify an instruction on intoxication. The court said:

> "* * * There was substantial evidence that the defendant had been drinking intoxicating liquor during the night on which the homicide occurred. He was operating what is described by the witness as a beer garden and dance hall. The homicide occurred sometime about midnight or probably a little later. The testimony given by the defendant as a witness in his own behalf was vague and uncertain. There were a great many circumstances which he did not remember and others which he could not fully explain. From the testimony showing that he had been drinking and his own testimony showing that he did not have any clear recollection of just what happened at about the time the homicide occurred, the jury could reasonably have drawn the conclusion that his mind was clouded by the effects of intoxicating liquor * * *." at 386

It is respectfully submitted that there was no evidence in the instant case from the jury could reasonably have inferred that these offenses were done in a state of mind so intoxicated as to negative specific intent. No witness, including Appellant, asserted that he was intoxicated in anyway. There is not even evidence of any specific quantity of alcohol consumed during the several hours Appellant drove around before the robbery.

What the evidence does show is that the robbery and the killing of the victims to leave no witnesses was carefully

planned in advance by Chavis and the Appellant.(R-1509) And, unlike Bryan, Appellant did not claim to be unable to remember what he did that night. He was emphatic that he did not leave home and could not have been the killer.(R-1585)

Thus, it appears that this case is controlled by Shaw v. State, 228 So.2d 619 (Fla. 2d DCA 1969), where the Court held that a requested instruction on intoxication was properly refused on the evidence that Shaw recalled with remarkable clarity all events leading up to the offense. Further, the method in which these homicideswere carried out belie any incapacity to form specific intent. Accordingly, intent can be presumed from this evidence of premeditated robbery and elimination of witnesses, so that the instruction was properly refused upon authority of Askew v. State, 118 So.2d 219 (Fla. 1960).

The issue for the jury here was not whether Appellant was too drunk to know what he did -- no such claim was made below and no basis appears in the record. The issue was whether Appellant was present at the scene, committing cold-blooded, calculated robbery and witness elimination, as his accomplices claim, or whether he was home drinking and nowhere near the scene, as he claimed. It is respectfully submitted that this is an alibi case, not an intoxication case, and the requested instruction was properly refused.

POINT III

JUDGMENTS OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES SHOULD BE ALLOWED TO STAND AS THE VERDICTS ARE FULLY SUPPORTED BY THE EVIDENCE.

A R G U M E N T

Appellant speaks of flimsy, circumstantial evidence, but to do so he must disregard the State's case. Though there were no eyewitnesses to the shooting, there was direct evidence from accomplices who heard the shots and saw Appellant inside and coming out with the stolen goods. They heard him planning both the robbery and the killing beforehand, and heard him seek to establish an alibi after. This may be accomplice case, but it is certainly not a circumstantial case.

Appellant also belittles his own statement of what he did, claiming he was drunk when he said it. However, the evidence is that he was sober when he said it (R-1495), and though he had several drinks thereafter, he was still only half intoxicated (R-1490), probably because after a sip of each he threw the rest in his wife's face.(R-1488-1489)

Appellant's principal complaint is unequal treatment of his accomplices. He mentions his effort to bring up Chavis in his closing argument (R-1662), but Appellant can find nothing which had been placed before the jury at that time to support

his argument. The court was clearly correct in sustaining the State's objection.

Appellee will concede that codefendants should be treated equally on the same or similar facts. Slater v. State, 316 So.2d 539 (Fla. 1975). But different sentences may be justified where there is a basis for distinquishing the acts of the defendants, Douglas Ray Meeks v. State, Case No. 47,533, Opinion of this Court filed October 28, 1976 (see page 9).

Viewed in this light, Appellant clearly has no cause to complain of the disposition of his wife and witness Collins. Neither entered the store nor shot anyone. His wife testified that she went along only because she was scared of him.(R-1536-1537) And she testified that Collins was unwilling to kill the victims just to eliminate witnesses.(R-1509)

The record shows that Chavis plead to murder in the second degree and was sentenced to life in prison on each count. It does show that he was willing to kill the victims (R-1509), and did in fact shoot one. Aside from that, the record is silent as to whether he did either of the following, both of which Appellant did:

1) threatened potential witnesses against him with death if they talked (see R-1460-1462, 1478, 1479, 1523, 1524, 1549, 1560), and Sawyer v. State, 313 So.2d 680 (Fla. 1975).

2) attempted to cover up the offense by phony alibi.(R-1518)

It is clear that Chavis' victim died at once, while Appellant's

lingered for as much as an hour, which makes Appellant's personal act of homicide more heinous (see e.g., Halliwell v. State, 323 So.2d 557 (Fla. 1975). It is also clear from Appellant's statement that he initially shot his victim for fear the man had a gun, but continued shooting even though the victim raised his hands and pleaded for mercy.(R-1514) Chavis shot only when the other victim attacked Appellant.(R-1430)

Appellee suggests that Appellant is distinguishable from his codefendants by the presence of additional aggravating circumstances not shown to be present as to the others. Appellee further would note that there is no indication of any statement by Chavis like that Appellant made. This Court should not ignore the likely difficulty in trying Chavis with no confession, and testimony only from accomplices who were not inside the store. That the prosecutor thought less of his chances to obtain death sentences in Chavis' case should not diminish in anyway the fact that Appellant's acts fully warrant the punishment imposed.

POINT IV

JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES SHOULD BE ALLOWED TO STAND EVEN THOUGH ONE MEMBER OF THE GRAND JURY HAS BEEN PURGED FROM THE VOTER LIST BEFORE THE INDICTMENT ISSUED.

A R G U M E N T

It is hardly clear from the record that Appellant proved the allegations of his motion to quash the indictment. (R-936-937) Certainly, the affidavit of the Supervisor of Elections could have been objected to for lack of cross-examination. (R-927-928)

Also, it is hardly clear that the motion was timely filed, since it came long after the thirty days allowed at arraignment for filing motions. (R-200) See Fla.R.Crim.P. 3.190(c).

Nonetheless, it appears that all parties agreed, or did not dispute at the hearing on the motion (R-995-999), that a grand juror had been on the voter list when that list was submitted to the County Commission, but subsequently purged for not voting. (R-996-997) The trial judge denied the motion, specifically adopting findings of fact and conclusions from a similar case. (R-999) Appellant has neglected to bring the findings and conclusion thus adopted forward for this Court's consideration.

The practical effect of accepting Appellant's argument would be to impose an intolerable burden on lower courts. Court personnel would have to check daily to be sure no juror or grand juror had been purged that day. But such a result is neither desirable nor legally required.

There are cases which hold that a single disqualified grand juror will vitiate an indictment. But each case involves an actual or alleged disqualification of substance. Kitrol v. State, 9 Fla. 9 (1360), involved an alleged overaged juror. In Lindsay v. State, 97 Fla. 701, 122 So. 1 (1929), a deputy sheriff Feigned resignation so he could serve as a grand juror. Hicks v. State, 97 Fla. 199, 120 So. 330 (1929), involved a substitution by the sheriff of a person not selected for the grand jury to replace one who was Cotton v. State, 85 Fla. 197, 95 So. 668 (1923), contained an allegation that a grand juror was not a resident.

Appellee can not understand how the purging of the juror from the voting list renders her any less a qualified elector. Her qualifications do not change, and she has only to re-register to be restored. Appellee would have this Court distinguish this case from those recited above because this case involves no alleged defect in substantive qualification. If this Court is unwilling to do that, it should nonetheless affirm this case, since it appears the juror was qualified when her name was drawn. In Bryson v. State, 211 So.2d 246 (Fla. 3d DCA 1968), cert.den. 218 So.2d 173, the court held that a jury list which was valid when drawn would not become

illegal just because the method of selecting veniremen changed later in the year. The same reasoning should be applied to this juror.

POINT V

A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES SHOULD BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN ORDER DISCHARGING THE DEFENDANT WHEN IT DID AFFIRMATIVELY APPEAR, IN VIOLATION OF SPEEDY TRIAL RULE, THAT DEFENDANT WAS INCARCERATED AND AVAILABLE FOR TRIAL FOR A PERIOD OF 450 DAYS.

A R G U M E N T

Appellant recognizes that the State's interlocutory appeal was filed April 4, 1975 (R-760), and mandate thereon was not returned until November 6, 1975. (R-902) He also recognizes an initial order tolling the time for speedy trial (R-680), and diverse subsequent orders to the same effect. (R-770, 795) The last order extended the time to a reasonable time after the mandate of the appellate court might be received.

Appellant argues that only one 60 day extension was validly granted, since the court lacked jurisdiction thereafter because of the pending appeal. Appellant overlooks that the initial extension was not limited to 60 days. The Court expressly declined to thus limit the appellate court (R-918), and neither the motion (R-673), nor the order (R-680), is so limited.

Appellant is also mistaken in arguing that the lower court lost jurisdiction to extend the time after the notice of

appeal was filed. Fla.R.Crim.P. 3.191(d)(2), is clear in this regard:

> "When Time May Be Extended. The periods of time established by this Rule for trial may at any time be waived or extended by order of the court (i) upon stiputation, signed in proper person or by counsel, by the party against whom the stipulation is sought to be enforced, provided the period of time sought to be extended has not expired at the time of signing, or (ii) on the court's own motion or motion by either party in exceptional circumstances as hereafter defined, or (iii) with good cause shown by the accused upon waiver by him or on his behalf, or (iv) a period of reasonable and necessary delay resulting from proceedings including but not limited to an examination and hearing to determine the mental competency or physical ability of the defendant to stand trial, for hearings on pre-trial motions, for interlocutory appeals, and for trial of other pending criminal charges against the accused. For the purposes of this Rule, any other delay shall be unexcused." (emphasis added)

Any notion that a trial court loses jurisdiction to stay proceedings would be contrary to Fla.App.Rule 5.1, which clearly contemplates that supersedeas may be obtained after the appeal is filed, and Fla.App.Rule 6.15(a) which does not even allow bail in criminal appeals until after the notice of appeal is filed.

Appellee submits that the orders below were fully effective to properly extend the speedy trial time, so that Appellant's argument is without merit. Appellee would also suggest that the appeal pursuant to Section 924.071, Fla.Stat. automatically stays proceedings, just as the statute provides.

Though cases such as Mullin v. State, 307 So.2d 829 (Fla. 3d DCA 1975), and State v. Cannon, 332 So.2d 127 (Fla. 4 DCA 1976), have required an order of extension, Appellee submits that the better view is stated in State v. Pearce, 336 So.2d 1274 (Fla. 1 DCA 1976), which effectuates the tolling provision but leaves it open to the defendant to show lack of good faith attending the appeal.

That the appeal here was meritorious is clear from the fact that it produced a reversal. Though Appellant does claim the State did not live up to its promises as to time sequences and personal handling, he can not and does not point to any delay in the handling of the appeal.

It is respectfully submitted that the motion for discharge was properly denied.

CONCLUSION

It is respectfully submitted that Appellant has failed to demonstrate reversible error in the judgments of guilt or the sentences to death. The judgments and sentences are richly deserved for the crimes committed, and should be severally affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been furnished Lester Bales, Jr., Esquire, Attorney at Law, Post Office Box 1448, Titusville, FL 33599, via Mail, this 15th day of November, 1976.

Charles W. Musgrove

CHARLES W. MUSGROVE
Assistant Attorney General

OF COUNSEL FOR APPELLEE

C

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIGAAH ARDALLE JACOBS,	:	
Appellant,	:	
-vs-	:	CASE NO. 49,345
STATE OF FLORIDA,	:	
Appellee.	:	

REPLY BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIGAAH ARDALLE JACOBS,	:	
Appellant,	:	
-vs-	:	CASE NO. 49,345
STATE OF FLORIDA,	:	
Appellee.	:	

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Inasmuch as the Appellant in his Brief, referred to himself as the Defendant instead of Appellant, and to the State of Florida as the State instead of Appellee, the same designations will be used in this Reply Brief.

For convenience of the Court we will still refer to the Transcript of Record as (Vol. ____, page ____).

STATEMENT OF THE CASE

The parties are apparently in substantial agreement as to the Statement of the Case.

STATEMENT OF FACTS

The parties are also in agreement as to the Statement of Facts contained in Defendant's Brief, with minor discrepancies.

ARGUMENT

QUESTION 1.

SHOULD A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT ADMITTED HEARSAY TESTIMONY ESTABLISHING ONE ELEMENT OF THE CORPUS DELICTI.

The State chooses to ignore the Defendant's argument on this question, namely, that such statements made by the witness based upon hearsay information, required that the identifying witness be present in Court as set forth in WILLIS v STATE, 217 So. 2nd 106.

In (Vol. IX, pages 1404, 1405, 1406) repeatedly the witness Vogt, a police officer, was asked questions by the State which were solely for the purpose of eliciting testimony from the witness as to conversations with third persons who did not appear at the trial and we would again state that WILLIS governs in this situation and that said testimony was prejudicial to Defendant.

QUESTION 2.

SHOULD JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN INSTRUCTION ON INTOXICATION WHEN TESTIMONY CLEARLY INDICATED THE USE OF INTOXICATING BEVERAGES ON THE DATES AND TIME IN QUESTION AND WERE CLEARLY A MATTER TO BE CONSIDERED BY THE JURY.

The State apparently admits that alcoholic beverages were used by both the Defendant and Co-Defendants in this matter but claims that the Jury was not entitled to receive any type of an instruction concerning intoxication.

As stated in the Defendant's Brief, there are numerous incidents of the use of intoxicating beverages by the Defendant and Co-Defendants. The thrust behind Defendant's argument as to this question was that the Jury, based upon the testimony produced before the Court relating to the use of alcoholic beverages, was entitled to receive a general instruction concerning intoxication. The State, in response to Defendant's argument, chooses to argue the effectiveness of such testimony and states as a basis for denying such requested information, that there was no proof as to the quantity of alcoholic beverages consumed. In (Vol. IX, page 1584), Defendant indicates that he drank about a half quart of vodka and a six pack of beer and also testified that when he drinks he goes to sleep (Vol. X, page 1601).

In support of its argument, the State in its Appellee's Brief, citing SHAW v STATE, 228 So. 619 (Fla. 2nd DCA, 1969)

wherein the Court denied a requested instruction on intoxication, it is stated that the Defendant Shaw "recalled" with remarkable clarity, all events leading up to the offense which, of course, is not the situation from evidence produced at the trial in this cause.

Again, as stated in LAYTHE v STATE, 330 So. 2nd 113, 3rd DCA (1976), the Defendant was entitled to have the Jury instructed on the law applicable to intoxication if there was any evidence produced to support the instruction. In the instant case there was more than ample testimony presented both by the Defendant and the State's witness to show the use of intoxicating beverages requiring the Jury be instructed in this regard.

QUESTION 3.

SHOULD JUDGMENTS OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE SAID JUDGMENTS WERE BASED UPON A VERDICT THAT IS CONTRARY TO THE LAW AND WEIGHT OF EVIDENCE PRODUCED.

The State again overlooks, or chooses to ignore, the purpose of Defendant's argument in this regard, namely, that the Court committed error in refusing to permit the Jury to know the Sentence received by a Co-Defendant (Vol. X, page 1662).

There is no question that the participation of the Defendant Chavis in the offenses charged was fully before the Jury both by testimony of State Witnesses and by the Defendant. The Jury was entitled to know what happened to Chavis. Therefore, under SLATER v STATE, 316 So. 2nd 539 (1975), it does appear that the verdicts and judgment in this case does not constitute equal justice under the law, MESSER v STATE, 320 So. 2nd 137 (1976).

QUESTION 4.

SHOULD JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION TO QUASH THE INDICTMENT WHEN IT CLEARLY APPEARED THAT ONE MEMBER OF THE GRAND JURY ISSUING SAID INDICTMENT WAS NOT QUALIFIED AS SUCH GRAND JUROR UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

The State in its argument on this question apparently admits that an unqualified Grand Juror was serving on the Grand Jury who issued the Indictment in this cause but further argues that purging of a Juror from the voting list is insufficient grounds to declare such a Grand Juror as unqualified.

Defendant would merely again state that under Article VI, Section 2, Florida Constitution, the requirements to be a qualified elector are set forth. That under Section 40.01, Florida Statutes (1973), a Grand Juror, in order to be qualified as such, has to be a qualified elector. The Grand Juror in question did not meet such qualifications and the Indictment should have been quashed.

QUESTION 5.

SHOULD A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN ORDER DISCHARGING THE DEFENDANT WHEN IT DID AFFIRMATIVELY APPEAR, IN VIOLATION OF SPEEDY TRIAL RULE, THAT DEFENDANT WAS INCARCERATED AND AVAILABLE FOR TRIAL FOR A PERIOD of 450 DAYS.

In its argument on this question the State does indicate that the Interlocutory Appeal was meritorious inasmuch as it did produce a reversal and we would submit that the record clearly shows in this cause that the case was remanded only for finding of fact, which upheld the Defendant's position in this matter (Vol. V, page 909). It is also noted that the State argues that the first order of this Court expressly declined to limit the time of the extension. Attention is called to the fact that the State's Motion resulting in said Order (Vol. IV, page 678) was pursuant to Rule 3.191 (f) F.R.C.P. and not under Rule 3.191 (d) (2) F.R.C.P. as referred to in the State's argument. The subsequent actions by the State in requesting additional continuances, would verify the fact that it was fully aware of the fact that only a sixty day extension had been awarded in this regard.

The State cites Fla. App. Rule 5.1 as authority for a Trial Court to Stay a proceeding after an appeal is filed. In this case the Trial Court granted its first order granting the extension of the Speedy Trial Rule on March 18, 1975, and

the Notice of Appeal was not filed until April 4, 1975.

The State's argument that the initial Court's Order of March 18, 1975, was not limited to the sixty days period but overlooks the fact that the State apparently very well understood that said extension was only for the sixty day period by filing its Motion of April 16, 1975, for an additional extension.

We would again re-allege as set forth in Defendant's Brief, that the original Motion for Continuance was taken under the exceptional circumstantial provisions of Rule 3.191 (f) F.R.C.P. (Vol. IV, page 658) and that the Order granted was pursuant to said Motion and gave the State exactly what it requested, sixty days.

The State places much reliance upon STATE v PEARCE, 336 So. 2nd 1274 (1st DCA, 1976), but it is also noted that the Order appealed from in said case was from an Order dismissing the information against Appellees Pearce, et al, and that apparently said appeal was pursuant to 924.071 F.S. and not under Rule 3.191 (f) F.R.C.P.

The State had an election as to the procedure it would follow in prosecuting the Interlocutory Appeal and the Court should give consideration as to the representations made by the State at the time of requesting such extension, such as completing the appeal in sixty days and handling the appeal through the State Attorney's Office and not turning same over to the Attorney General's Office for the purpose of prosecuting such appeal.

CONCLUSION

It is again respectfully submitted, based upon Defendant's and State's Brief and this Reply Brief that the relief requested in Appellant's Brief should be granted and that the Defendant should be either immediately discharged or an Order entered reversing the Judgment and Sentence of the Circuit Court of Pasco County, Florida, in this case.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIGAAH ARDALLE JACOBS, :

Appellant, :

-vs- : CASE NO. 49,345

STATE OF FLORIDA, :

Appellee. :

CERTIFICATE OF SERVICE

I, LESTER BALES, JR., Attorney for Appellant, do, hereby, certify that a true copy of the Reply Brief of Appellant has been furnished by regular U. S. Mail to the Honorable ROBERT L. SHEVIN, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32304, this 1st day of Dec., 1976.

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No. 81-5169

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ELIGAAH ARDALLE JACOBS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

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No. 81-5169

IN THE

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vs.

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ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

I. THE ISSUE WHETHER PETITIONER'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS VIOLATED RISES TO THE LEVEL ENTITLING PETITIONER TO RELIEF BY THIS COURT.

Petitioner agrees that this Court will not decide federal constitutional issues raised for the first time on review of state court decisions. Cardinale v. Louisiana, 394 U.S. 437 (1969). Petitioner contends, however, that a federal question involving his constitutional right to a speedy trial was raised to the level entitling petitioner to relief by this Court.

This Court has long held that no particular form of words or phrases is necessary to assert a claim of federal rights. See Street v. New York, 394 U.S. 576, 584 (1969); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Green Bay & Canal Co. v. Patten Paper Co., 172 U.S. 58, 67 (1898); Murray v. Charleston, 96 U.S. 432, 442 (1877). The test for determining whether a federal question was raised is not whether the record contains an express statement that a federal question was present but whether such rights were claimed in the state court in such a manner as to bring it to the attention of that Court. See Street v. New York, 394 U.S. 576, 584 (1969); Green Bay & Canal Co. v.

Patten Paper Co., 172 U.S. 58, 67-68 (1898); Murray v. Charleston, 96 U.S. 432, 442 (1877).

In cases involving the claim to a speedy trial -- the claim at stake in this case -- merely raising that claim in the state court necessarily invokes federal constitutional issues. Indeed, the Court of Appeal of Florida has held that in such cases the federal constitutional standard must apply to the proceedings. Suggs v. State, 358 So.2d 55, 56 (1978); see Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967). Thus, by repeatedly raising the issue of his right to a speedy trial, Petitioner brought his federal constitutional right to a speedy trial to the attention of the Florida courts.

The Supreme Court of Florida itself recognized these principles in this very case when the court noted the necessity of applying "a constitutional test of reasonableness...." Jacobs v. State, 396 So.2d 1113, 1116 (1981). The difficulty, of course, is that the court failed to recognize the correct "constitutional test".

Because the Supreme Court of Florida concluded that Petitioner's claims did not violate the Florida Speedy Trial Rule, Respondent contends that no federal question was raised. Respondent has ignored, however, the fact that a delay in the prosecution of an offense which does not violate the Speedy Trial Rule may nevertheless violate Petitioner's constitutional right to a speedy trial and requires application of the Barker test. Suggs v. State, 358 So.2d 55, 56 (Fla. App. 1978).

Respondent cites Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977), as support for its contention that Petitoner failed to raise a federal question for appellate review. The cited case, however, is inapposite to the facts presented in Petitioner's brief. Unlike Petitioner, Davis never raised in a state court the defense of a speedy trial. Davis v. Wainwright, 547 F.2d 261, 263 (5th Cir. 1977). Petitioner repeatedly raised his right to a speedy trial in the Supreme Court of Florida. Having brought his constitutional right to the attention to the court,

Petitioner, unlike Davis, raised the issue to the level entitling Petitioner to relief by this Court.

The issue raised by Petitioner in the state court goes to the fundamental fairness of the trial. Petitioner's claim that the decision by the Supreme Court of Florida violated his fundamental right to a speedy trial should be reviewed by this Court.

Respectfully submitted,

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